Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1726

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

versus

MOBIL OIL CORPORATION, ET AL.,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Mobil Oil Corporation, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the fifth circuit.

OPINIONS BELOW

The opinion of the court of appeals, printed as Appendix C, p. A-54, hereto, is reported *sub nom*, *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977). The district court's initial opinion, printed as Appendix A, p. A-1 hereto, is reported under the same style at 357 F.Supp. 1164 (W.D. La. 1973); while the second opinion, which deals with the issue of damages, printed as Appendix B, p. A-32 hereto, is reported at 360 F.Supp. 1140 (W.D. La. 1973).

JURISDICTION

The judgment of the court of appeals, printed as Appen-

dix E, p. A-96, is dated January 13, 1977. An order of the court of appeals denying Petitioner's motion for rehearing and suggestion for rehearing en banc, printed as Appendix D, p. A-94, is dated March 7, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the maritime cause of action for death occurring within a state's territorial waters created by this Court in Moragne[1] completely replaces the statutory cause of action for death mandated by Congress with respect to deaths occurring within the geographical scope of the Death on the High Seas Act.[2]

(2) When an employee meets his death while assigned to a fixed platform on the outer continental shelf, is the exclusive remedy of the employee's beneficiaries against his employer the compensation remedy mandated by the Outer Continental Shelf Lands Act[3] or can such beneficiaries recover under the Jones Act[4] or the general maritime law as if the employee was a seaman simply because he had worked for his employer as a seaman in the past?

1. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). This decision will be referred to as *Moragne*.

2. 45 U.S.C. §§ 761-68 (1920) (hereafter DOHSA). The geographical scope of DOHSA was not involved in *Moragne* where the death occurred within the territorial waters of a state, as DOSHA statute applies only to maritime casualties which occur "on the high seas beyond a marine league from the shore" of the United States.

3. 43 U.S.C. §§1301-43 (1953) (hereafter Lands Act.)

4. 46 U.S.C. § 688 (1920).

(3) In death actions against both the operator and manufacturer of a helicopter arising out of a crash in the Gulf of Mexico in which plaintiffs offered substantial evidence of a manufacturing defect as the cause of the crash, and the Court found the . . . ., "evidence is so insufficient that no actual, probable or suggestive cause of the crash. . . [can] be determined with any degree of certainty." A-63. Can a judgment against the operator only based upon res ipsa loquitor be maintained?

STATUTES INVOLVED

The relevant portions of DOHSA, as amended, are as follows, 46 U.S.C. §761 (1970), 41 Stat. 537:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty,. . . against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 762 (1970), 41 Stat. 537:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought.

The relevant portion of the Jones Act, as amended, is as follows, 46 U.S.C. § 688 (1970), 38 Stat. 1175:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

The relevant portions of the Lands Act, as amended, are as follows, 43 U.S.C. § 1333 (1970)67 Stat. 462:

> Jurisdiction of United States District Courts
>
> (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf, for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, . . .

> Applicability of Longshoremen's and Harbor Workers' Compensation Act; definitions
>
> (c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section --
>
> (1) the term 'employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term 'employer' means an employer any of whose employees are employed in such operations; and
>
> (3) the term 'United States' when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT OF THE CASE

Petitioner Mobil Oil Corp. (hereafter Mobil) owned a helicopter which was used in its oil and gas drilling operations offshore Louisiana. On June 6, 1967, the aircraft landed on a fixed platform approximately 100 miles off the Louisiana

coast in the Gulf of Mexico for the purpose of deplaning several workers and picking up others, including James Nation. The helicopter disappeared within the geographic area covered by DOHSA shortly after take-off with only a few remnants of the aircraft being found. Three passengers and the pilot of the aircraft died in the casualty. One of the passengers (Marshall Higginbotham) was an employee of Baxter Drilling Company, while the other two passengers (James Shinn and James Nation) were in the employ of Mobil.

Litigation was commenced in a non-jury action in the district court against Mobil and Bell Helicopter Co., the manufacturer of the helicopter (hereinafter Bell), seeking damages for the deaths based on the general maritime law as enunciated by this Court in *Moragne* and *Gaudet*,[5] as well as the two federal statutes, the Jones Act and DOHSA. The district court held with respect to the two Mobil employees that the undisputed evidence established:

(1) that Nation was assigned to Mobil's fixed platform Baxter No. 3 from which the helicopter last departed at the time of the accident, and

(2) that Shinn was assigned to one of Mobil's drilling vessels at the time of the accident.

The district court therefore held that Nation was not a seaman because he was assigned to a stationary platform at the time of the accident,[6] while Shinn was a seaman because he was a member of the crew of a drilling vessel. Higginbotham was not an employee of Mobil and his beneficiaries thus asserted a third party action against Mobil.[7] The district court therefore concluded that the survivors of the three decedents came within the scope of the stated remedial statutes (Jones Act, DOHSA and Lands Act) and the general maritime decisional law (*Moragne*). As to each, the court held:

Higginbotham	DOHSA and the General Maritime law.[8]
Shinn	DOHSA, the General Maritime Law and the Jones Act.[9]
Nation	Lands Act.[10]

Having determined that the beneficiaries of Higginbotham and Shinn were entitled to recover under DOHSA and the general maritime law and as to Shinn's beneficiaries also as a seaman under the Jones Act, the district court held that the respective beneficiaries were entitled to recover only the pecuniary damages mandated by Congres in both DOHSA and the Jones Act, and that the death action created in *Moragne* did not make non-pecuniary damages recoverable under the general maritime law for deaths occurring more than one marine league from shore.

5. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974). *Gaudet*, likewise, was limited to death occurring within state territorial waters and thus, DOHSA was not involved.

6. 357 F.Supp. 1164, 1177.

7. 357 F.Supp. 1164, 1175-1176.

8. 357 F.Supp. 1164, 1174-1175.

9. 357 F.Supp. 1164, 1175-1176.

10. 357 F.Supp. 1164, 1176-1178.

Concluding that Nation was assigned to a fixed platform on the outer continental shelf at the time of the accident, the district court held, as Congress mandated , that the Lands Act was the exclusive remedy of his survivors against his employer.[11]

As to the first question presented by this Petition, the panel of the court of appeals below held that the general maritime death action of *Moragne* and *Gaudet* had completely replaced DOHSA within its exclusive geographic sphere. The panel did so only because it considered itself bound by an earlier decision of another panel of the court of appeals below in *Law v. Sea Drilling Corp.*, 510 F.2d 242, *aff'd on rehearing*, 523 F.2d 793 (5th Cir. 1975) which had held that since *Moragne* provided "a federal maritime cause of action for death on navigable waters-- any navigable

11. The Lands Act expressly makes the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. applicable to injuries or deaths resulting from operations conducted on the outer continental shelf:

> "(c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation act under this section --
>
> (1) the term 'employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term 'employer' means an employer any of whose employees are employed in such oeprations; and
>
> (3) the term 'United States' when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereof." 43 U.S.C. § 1333(c).

waters," no one needed "DOHSA as a remedy" any longer.[12]

As to the second question presented by this Petition, the court of appeals below permitted a recovery as a seaman under the Jones Act simply because the employee had worked as a seaman in the past,[13] even though he had not been assigned to or performed any duties on any vessel for more than two weeks prior to the accident and had been assigned to work, and had worked, for more than a week solely on a fixed platform on the outer continental shelf.[14]

12. 523 F.2d at 798. Indeed the *Law* panel in the court below concluded that this Court in *Moragne* in overruling *The Harrisburg*, 119 U.S. 199 (1886) also repealed DOHSA and affirmatively so stated:

> "It is time that the dead hand of *The Harrisburg*--whether in the courts or on the elbow of the Congressional draftsmen of DOHSA--follow the rest of the hulk to an honorable rest in the briney (sic) deep.
>
> "No longer does one need a state remedy. No longer does one need a state court, or The Admiralty as a Court, or DOHSA as a remedy." 523 F.2d at 798.

13. The Court below did so primarily on its "allegation" that the employee "spent all but a small fraction of his working time on Mobile's submersible drilling barges" during the two years immediately prior to his death. We use the term "allegation" advisedly, because the record below belies this statement. While the record lacks absolute clarity on this issue, it reflects that for the two years prior to his death, Nation was assigned to work on fixed platforms or on land 56.3% of his working time and only 43.7% of his working time was as a seaman aboard drilling vessels. The court of appeals below did not attempt to identify the "vessel" on which Nation was serving as a member of the crew at the time of his death because it could not do so. The last drilling barge to which he had been assigned was no longer under charter to Mobil, having been moved off location, released by Mobil and returned to its owner more than two weeks prior to Nation's death.

14. The district court had specifically so found on undisputed evidence: "At the time of his death on the 206A Jet Ranger Nation was employed by Mobil as a toolpusher on a stationary platform Baxter Rig No. 3. His claim to seaman's status is based on the assertion that he was temporarily on the stationary platform and that his regular employment was on submersible drilling barges owned by Mobil. How-

As to the third question presented by this Petition, the panel of the court of Appeals held that *res ipsa loquitor* was applicable as against Mobil only.

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below that this Court's *Moragne* death remedy replaces the Congressional DOHSA death remedy for death occurring more than one marine league from shore is in direct and irreconcilable conflict with the decision of the Court of Appeals for the First Circuit in *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974).

The irreconcilable conflict between the two courts of appeals is demonstrated by comparing the respective holdings:

This Case (*Higginbotham*)	*Barbe*
"Although earlier reserving the question of the applicability of *Moragne* on the high seas. *In Re Dearborn Marine Serv. Inc., supra,* at 270 n. 12, a panel of this circuit has since held 'that *Moragne* applies not only to navigable waters of the	"Since DOHSA clearly provides a cause of action for wrongful death in this case, we fail to see how *Moragne* applies. We hold that the measure of damages for wrongful death provided by DOHSA, namely, 'pecuniary loss,' controls in the instant

ever, the evidence fails to identify him with any such barge except the Crestwave Topper No. 1 which was not under the control of Mobile at the time of the accident. It had been released by Mobil more than two weeks prior thereto." 357 F.Supp. 1164, 1176-1177.

This Case (*Higginbotham*)	*Barbe*
States, but to the High Seas as well, including the area defined in DOHSA,' and have accordingly awarded damages for loss of society for a death occurring beyond a marine league from shore. *Law v. Sea Drilling Co.*, 5 Cir. 1975, 510 F.2d 242, 250, *reh. denied, modified in part*, 5 Cir., 523 F. 2d 793 (1975)."[15]	case. The Supreme Court in *Moragne* stated that the recognition of a maritime wrongful death action would not 'require the fashioning of of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. 398 U. S. at 405-406, 90 S.Ct. at 1790.' Yet there is a substantial difference between removing a decisional bar like *The Harrisburg* and circumventing a statutory mandate like DOHSA."[16]

Indeed, in footnote 19, which was placed in the margin following the language quoted above from the opinion in this case, the court below specifically recognized and acknowledged this conflict with the First Circuit:

> *Contra, Barbe v. Drummond*, 1 Cir. 1974, 507 F. 2d 794, 800-02. If presented as an original matter, the members of this panel would be constrained to reach the result of the First Circuit in *Barbe*. While both *Barbe* and *Law* are undoubtedly correct in extending the right to recover for pain and suffering to deaths occurring on the high seas, the opinion in *Law* fails to distinguish between damages recoverable as survival items and as wrongful death items. Conscious pain and

15. 545 F.2d 422 at 435.

16. 507 F.2d 794 at 801.

> suffering is traditionally--and logically--a survival item. Loss of love and affection, or loss of society, on the other hand, is traditionally a wrongful death item. The members of the panel would read *Moragne* to say that DOHSA is the exclusive wrongful death remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel. 545 F.2d at 436, n. 19.[17]

It must be noted here that the *Moragne* maritime death remedy was created to provide a cause of action for death caused by the unseaworthiness of a vessel within the territorial waters of those states where the state wrongful death statutes provided a cause of action for death based only on negligence. This Court specifically limited its ultimate holding in *Moragne* to state territorial waters thusly:

> We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations *not covered by the Act*. (Emphasis supplied). 398 U.S. at 402.

No such *Moragne* death remedy based on unseaworthiness was or is needed in those situations covered by DOHSA simply because the courts have repeatedly held that the death remedy enacted by Congress in DOHSA permits a recovery if the death is caused by either unseaworthiness,

17. It should be noted that no petition for writ of certiorari was filed in either *Law* or *Barbe*. For analysis of *Law* and its conflict with *Barbe*, see Schill, *Moragne-Gaudet: Three If By Sea?*, 13 Hou. L. Rev. 917 (1976).

negligence or both.[18] Congress having provided for recoveries under the general maritime law for unseaworthiness and negligence in DOHSA for death on the high seas, and having fixed the damages recoverable, no court has the power to replace the statute completely as the panel of the court below did in *Law* by misconstruing this Court's decision in *Moragne*, or to amend DOHSA to award damages which Congress did not include in its statutory mandate.[19]

It is respectfully submitted that a writ of certiorari should be granted to resolve this direct conflict between the Courts of Appeals for the First and Fifth Circuits.

II.

The holding of the court below that the survivors of an employee who was assigned to work on a stationary offshore platform are entitled to recover on the basis that the decedent was a member of a crew of a vessel under the Jones Act is directly contrary to this Court's decisions in:

18. Doyle v. Albatross Tanker Corp., 367 F.2d 465 (2d Cir. 1966); Sennett v. Shell Oil Company, 325 F.Supp. 1 (E.D. La. 1971); Soileau v. Nicklos Drilling Company, 302 F.Supp. 119 (W.D. La. 1969); Chermesino v. Vessel Judith Lee Rose, Inc., 211 F.Supp. 36 (D. Mass. 1962), *aff'd.*, 317 F.2d 927 (1st Cir. 1963), *cert. denied*, 375 U.S. 931 (1963). *See*, Kernan v. American Dredging Co., 355 U.S. 426 (1958).

19. This Court has previously held that judicial views of what the law should be must not be substituted for a statute enacted by the Congress. National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers, 414 U.S. 453, 458 (1974); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962); United States v. Monia, 317 U.S. 424 (1943); and Southern Steamship Corp. v. N.L.R.B. 316 U.S. 31, 44 (1942). The legislative history of DOHSA shows that statutory remedy was intended to be exclusive. 59 Cong. Rec. 4483 (1920).

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

Senko v. Lacrosse Dredging Corp., 352 U.S. 370, 373 (1957).

Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941).

Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930).

In *Rodrigue* this Court held that a stationary offshore platform is not a "vessel," but rather an extension of land which comes within the scope of the Lands Act. The opinion makes it clear that employees who are assigned to such a platform are not afforded maritime remedies and the employee's exclusive remedy against his employer is the Longshoremen's and Harbor Workers' Compensation Act as extended by the Lands Act.[20] The court below completely

20. The Court of Appeals for the Fifth Circuit is in accord with *Rodrigue:* Nation v. Morris, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973); Ross v. Mobil Oil Corp., 474 F.2d 989 (5th Cir. 1973), *cert. denied*, 414 U.S. 1012 (1973); Owens v. Diamond M Drilling Co., 487 F.2d 74 (5th Cir. 1973); De'Ville v. Wise, 470 F. 2d 1384 (5th Cir. 1973); *cert. denied*, 414 U.S. 818 (1973); Smith v. Falcon Seaboard,Inc., 463 F.2d 206 (5th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); Keener v. Transworld Drilling Co., 468 F.2d 729; (5th Cir. 1972); Bertrand v. Forest Corp., 441 F.2d 809 (5th Cir. 1971), *cert. denied*, 404 U.S. 863 (1971).

ignored *Rodrigue*, and fashioned a new and novel rule that the work record of the employee over the preceding two-year period should be considered in determining whether he was a seaman at the time of the casualty instead of following the well established rule that his status as a member of the crew of a vessel is to be determined by his duties at the time of the casualty. The court below then held the employee Nation to be a seaman as a matter of law allegedly because (1) the employee "spent all but a small fraction of this working time on Mobil's submersible drilling barges."[21] and (2) because he was a temporary replacement for the foreman on the fixed platform.[22]

In holding that Nation's two-year work history prior to his death had to be evaluated to determine whether he was a member of the crew of a vessel entitling his beneficiaries to Jones Act benefits, the decision of the court below is in direct conflict with this Court's decisions in *Senko*,[23] *Desper*[24] and *Parker*,[25] all of which hold that an employee's remedy against his employer is to be determined by his work assignment at the time of his injury. In *Senko*, this Court held that Jones Act coverage depends "on a finding that the injured was 'an employee of the vessel, engaged in

21. Footnote 13 , *supra*, for the district court's findings on this issue.

22. 545 F.2d 422 at 433. This de novo fact finding is not only contrary to the conclusion of the district court, quoted *supra*, footnote 13 , but is also contrary to the undisputed record which shows that for the two years prior to the casualty he worked as a seaman only 43.7% of his work time on four submersible vessels and 56.3% of his work time on either fixed platforms or ashore.

23. Senko v. Lacrosse Dredging Corp., 352 U.S. 370 (1957).

24. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

25. Parker v. Motor Boat Sales, Inc. 314 U.S. 244 (1941).

the course of his employment's at the time of his injury"[26] (a test which Mr. Nation could not meet since he was not assigned to or an employee of any vessel on the occasion in question). In *Desper*, this Court held that the "question whether an individual was a 'seaman' . . . depends largely on . . . the activity in which he was engaged at the time of the injury," and that the status of a Jones Act seaman did not attach to a worker by virtue of the ". . .fact that he had been, or expected in the future to be, a seaman. . ."[27]

In *Parker*, an employee hired primarily as a janitor and porter was drowned while helping test an outboard motor for his employer. The rights of his beneficiaries against his employer were determined by his work assignment on the water at the time of his accident and this Court held that the employee's ". . .habitual performance of other and different duties on land . . ." could not alter this result.[28]

Thus, the reliance by the court below on the employee's two-year work history in holding Nation to be a Jones Act seaman is clearly wrong and in direct conflict with the noted decisions of this Court as it is his assigned work at the time of his injury which is determinative.

The court below also relied on its assumption that Nation's assignment to the fixed platform was only temporary, and at some time in the future he would again be assigned to a vessel. Its reliance on the "temporary" nature of his assignment to the fixed platform is also misplaced and is directly contrary to the decisions of this Court in *O'Rourke*[29]

26. 352 U.S. 370 at 373.

27. 342 U.S. 187 at 190-191.

28. 314 U.S. 244 at 246-247.

29. Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334 (1953).

and *Nogueira*.[30] In both *O'Rourke* and *Nogueira*, this Court held that a railroad employee's remedy against his employer was to be determined by his work assignment at the time of the injury. In both cases, the railroad employee was denied his railroad worker's remedy under the Federal Employers' Liability Act, 45 U.S.C.§ 51 et seq. (hereafter FELA), and the Longshoremen's & Harbor Workers' Compensation Act was held to be his exclusive remedy only because his injury occurred while he was working on a barge on navigable waters. Both were only on a barge part of the day and performed essentially railroad duties both ashore and afloat on the day of their accidents. The "temporary" nature of their work on navigable waters did not preserve their FELA rights as railroad workers, because at the time of their injury they were within the jurisdiction of the Longshoremen's Act, even though for only a few minutes or hours on the day of their accidents. In the present case, Nation had worked a full week on the platform, and had not worked on or been assigned to work as a member of the crew of any vessel for more than two weeks prior to his accident. The holding of the court below that Nation's beneficiaries were entitled to the benefits of the Jones Act (which adopted the FELA) which holding reversed the District Court's conclusion that Nation's exclusive remedy was the Lands Act (which adopted the Longshoremen's Act) is clearly in conflict with this Court's decisions in *O'Rourke* and *Nogueira*. This Petition should be granted to resolve this conflict.

The new and novel two-year work history rule of the court below for determining Jones Act status is also directly contrary to the decisions of the following Courts of Appeals:

30. Nogueira v. New York, N.H. & H.R. Co., 281 U.S. 128 (1930).

SECOND CIRCUIT

Long Island R. Co., v. Lowe, 145 F.2d 516 (2nd Cir. 1944) in which the Court held:

> ***The employee's duties on the day of the accident are the critical facts which should determine his status as a member of the tug's crew.*** It is true that if he had been called aboard for a single act of service, he might not become a member of the crew. But on the days when his employer assigned him to serve as 'mate' of the vessel, we hold that he was a crew member, although he might cease to be one on days when he was assigned for other duties. ***We can perceive no reason in the words or purpose of the Compensation Act for lumping an employee's activities over the period of his employment and classifying him according to the greater number of days on which he was either seaman or longshoreman.*** (Emphasis supplied). 145 F.2d at 518.

FIFTH CIRCUIT

Holland v. Allied Structural Steel Co., 539 F.2d 476 (5th Cir. 1976), in which the Court held:

> Nonetheless, there remains the jurisdictional requirement that a claimant alleging seaman status under the Jones Act have been connected, in more than a transitory way, with a vessel or vessels, *and* that his injuries have arisen in the course of his duties in the service of such vessel or vessels. (Emphasis supplied). 539 F.2d at 479.

SIXTH CIRCUIT

Antus v. Interocean S.S. Co., 108 F.2d 185, 187 (6th Cir. 1939), in which the Court held:

> The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature.

It is respectfully submitted that an employee's seaman status for Jones Act purposes must be determined by his assigned work activities at the time of his injury as this Court has previously held. To hold otherwise is to make employees seamen who are neither performing any duties in the service of a vessel nor incurring any of the risks inherent in doing a seaman's work. This has not been and should not be the law, and this Court should grant this Petition to resolve the conflict between the decision of the court below and the decisions of this Court and the other courts of appeals as demonstrated above.

III.

Both the district judge and the court of appeal found the evidence so insufficient that no probable cause of the accident could be determine.

> The district court states at A-16: "In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash [can] be determined with any degree of certainty."

and at A-20:

"These findings and observations on the evidence are not such specific conduct as could enable this court to proclaim any one or all to be a cause in fact of the crash. For the court to do so would be an exercise in speculation. The conclusion remains that the cause of the crash is unexplained.

At A-21-22

"There has been no specific negligent action or inaction on the part of Mobil to which the Court can label a contributing factor in this crash."

The trial court then went on to find "as a matter of law the doctrine of res ipsa loquitur in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation." A-22.

The panel of the court of appeals in a 2-1 decision overruled *Morrison v. LeTourneau Co.*,[31](5th Cir. 1943) and affirmed the District Judge's decision that res ipsa loquitur was applicable.

In *Morrison v. Le Tourneau Co.*, the plaintiff sued both the owner and the operator of an airplane that crashed without survivors raising questions similar to those posed in these suits. The Fifth Circuit holding that res ipsa loquitor was inapplicable said:

> "The doctrine of res ipsa loquitur cannot apply in cases of this sort because there is no showing

31. Morrison v. LeTourneau Co., 138 F.2d 339 (5th Cir. 1943).

> that accidents of this very sort cannot happen to the most skillful of pilots in planes of the finest type and condition. Even if the doctrine of res ipsa loquitur were applicable, there would be the impossibility of determining the defendant against whom the rule should be applied, since the two defendants are charged with separate and distinct acts of negligence. Would the jury be permitted arbitrarily to find that because a wing broke under the circumstances the Flying School furnished a defective ship, or that the ship was negligently operated by the Le Tourneau Company? The doctrine of res ipsa loquitur does not supply the material answer that is requisite. Neither does the evidence. It was wholly impossible for the jury to have determined from the evidence, and the inferences reasonably to have been drawn therefrom, either that the ship was defective or that it was negligently operated by Le Tourneau. If the proven facts give equal support to each of two inconsistent inferences, then neither is established, and 'judgement, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover'." 138 F.2d at 341.

To overcome *Morrison v. Le Tourneau* the court of appeals found that air crashes no longer "ordinarily occur" without negligence of the operator. A-72.

As Judge Gee observed in his dissent, the majority made this finding although:

> "The opinion of the court below attempts no factfindings about whether at the present time

airplane accidents in general ordinarily occur without negligence; moreover, the record contains nothing approaching the comprehensive evidence of a general nature sufficient to support such a conclusion." A-91

CONCLUSION

This petition calls for authoritative clarification of the important questions presented and resolution of the conflict between the respective courts of appeals and the decisions of this Court. It is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing Petition for Writ of Certiorari to be served on Jack Benjamin, 1718 NBC Building, New Orleans, La., 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Christovich & Kearney, American Bank Building, New Orleans, La., 70130; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La., 70510 and I. P. Saal, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 2nd day of June, 1977.

CARL J. SCHUMACHER, JR.

APPENDIX A

OPINION OF DISTRICT COURT

FILED: April 20, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 13,954

MRS. FRANCIS NELL HIGGINBOTHAM ADMX. ETC.
OF MARSHALL K. HIGGINBOTHAM, DECEASED, ETC.

versus

MOBIL OIL CORPORATION, ET AL

* * * * *

Civil Action No. 13,958

MRS. WANDA MOORE LONG, ADMX. of EST. OF
DECEASED JOSEPH C. LONG, JR., ETC.

versus

BELL HELICOPTER CO., ETC. ET AL

* * * * *

Civil Action No. 15,316

JEANETTE LEBLANC NATION, PERSONAL REPRESENTATIVE FOR ELLA MENARD NATION AND ROY GLEN NATION

versus

TEXTRON INDUSTRIES, INC., ETC. ET AL.

* * * * *

Civil Action No. 15,326

MRS. ARLINE J. SHINN, IND., ETC.

versus

MOBIL OIL CORPORATION

* * * * *

(Consolidated Cases)

FOR PLAINTIFFS:	MESSRS.
Mrs. Nell Higginbotham Mrs. Jeanette LeBlanc Nations	Charles M. Thompson, Jr. 112 S. Louisiana Avenue Abbeville, Louisiana 70510
Mrs. Wanda Moore Long	Jack C. Caldwell Aycock, Horne, Caldwell & Coleman 519 Main Street Franklin, Louisiana 70538

Mrs. Arline J. Shinn	Jack C. Benjamin Kierr & Gainsburgh Suite 1718 National Bank of Commerce Building New Orleans, Louisiana 70112

FOR THIRD PARTY PLAINTIFF:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112

FOR DEFENDANTS:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112
Bell Helicopter Company Bell Aerospace Corporation	Richard R. Christovich and C. Edgar Clouthier

Christovich & Kearney
Room 1815,
American Bank Building
New Orleans, Louisiana
70112

James F. Fitzsimons
Mendez & Mont
New York, New York

NAUMAN S. SCOTT, JUDGE

SCOTT, JUDGE:

These four actions were brought by the representatives of the pilot, Joseph Clyde Long, Jr. (Long), and three passengers, Marshall K. Higginbotham (Higginbotham), James Lex Shinn (Shinn) and James E. Nation (Nation), of a helicopter which crashed on August 15, 1967 in the Gulf of Mexico about 100 miles south of Morgan City, Louisiana. The aircraft was a Bell helicopter, Model 206A Jet Ranger, Serial No. 46 (the 46th such craft sold by Bell) bearing the official registration number N7846S. The aircraft was only two months old at the time of the crash, having been purchased by Mobil Oil Corporation (Mobil) from Bell Helicopter Company (Bell) on June 6, 1967. It had been flown a total of 165 hours and 45 minutes. Bell was the manufacturer and Mobil was the owner and operator of the helicopter. The pilot Long, an employee of Mobil, had left Morgan City at approximately 1:50 P.M. with Shinn and other passengers whom he dropped at Baxter Rig No. 3 where he had picked up the two other passengers Higginbotham and Nation. The aircraft took off from Baxter Rig No. 3 between 3:30 and 4:00 o'clock in the afternoon

and simply disappeared without trace of the aircraft or its passengers except a small portion of the aircraft recovered later that afternoon, including the bottom part of the cabin with the pontoons attached and that portion of the tailboom located in the rear of the horizonal stabilizer. The helicopter crashed between one and three miles from the site of takeoff.

Mrs. Frances Nell Higginbotham and Jeanette LeBlanc Nation, representatives of Higginbotham and Nation respectively, instituted their actions against Bell and Mobil. In both cases Mobil filed cross-claims against Bell seeking indemnification and/or contribution for all liability adjudged against Mobil, indemnity for all benefits paid under the Longshoremen and Harbor Workers Compensation Act and recovery for the loss of its aircraft.

Mrs. Arline J. Shinn, the representative of Shinn, filed her complaint (amended) against Mobil and Bell, and Mobil filed a third party demand against Bell similar to that filed by it in the other two suits.

Mrs. Wanda Moore Long filed her action against Bell. Mobil is not a party to this action. The four actions were consolidated for trial.

The accident occurred on high seas over the outer continental shelf in the Gulf of Mexico far outside the boundaries of the State of Louisiana, and those satisfies the traditional locality test of jurisdiction, *The Plymouth*, 70 U.S. (3 Wall) 20, 18 L.Ed. 125 (1866). The fated helicopter was owned and operated by Mobil in conjunction with its extensive offshore activities, and, at the time of the fatal accident, was performing the ordinary functions of a

crewboat. Unquestionably it was engaged in maritime activity and was not operating as a "land-based aircraft between points within the continental United States." *Executive Jet Aviation v. Cleveland,* U.S. , 34 L.Ed. 2d 454, 93 S.Ct. (1972). We have jurisdiction.

The liability of Bell, whether under the Death on the High Seas Act, the General Maritime Law, or the Laws of Texas or Louisiana, should first be considered as an issue of fact. The primary contention of plaintiffs and Mobil against Bell is that the tailboom of the N7846S completely separated from the remainder of the aircraft while in flight. The contention is that this separation occurred just aft of the horizonal stabilizer (the forward end of that portion of the tailcone identified as "Plaintiffs' Exhibit P-1"). As a result, the aircraft became uncontrollable and subsequently crashed into the Gulf of Mexico. Plaintiffs and Mobil further contend that Bell was negligent in designing and manufacturing a faulty product without adequate testing procedures and that this negligence on the part of Bell was the sole and proximate cause of the accident. Specifically, plaintiffs and Mobil advance and attempt to support the theory that a fatigue crack (or cracks) originating in the lower left quadrant (looking aft) of the 360° fracture on the forward end of Exhibit P-1, propagated in fatigue approximately four inches to a point at which the loads existing on the tailboom accelerated the propagation of the fracture which continued in tension resulting in complete separation. There is no dispute that the entire remaining circumference of the fracture on the forward end of P-1, save the approximate four inches mentioned above, failed in tension as opposed to fatigue. There is no disagreement that the tension portion of this fracture occurred relatively instantaneously, whether from loads in flight or loads which

would occur upon striking the water. However, Bell disputes the existence of any fatigue fracture at all, and there is disagreement as to what effect the four or five inch crack (the alleged fatigue fracture above referred to) in this area of the tailboom would have on the ability of the boom to withstand the loads in experiences in flight operations over a period of several hours. Plaintiffs and Mobil offered no other contentions as to the direct cause of the disaster other than the separation of the portion of the tailboom in flight.

In determining this question of fact, the Court must rely on the testimony of experts who were most eminently qualified by education, training and experience. We have given due consideration to the comparative qualities of each of these experts; to their connections with the parties; to the extent and detail of the examinations conducted by each, and to the fact that very little (absolutely none of the main power and control units or instrument panel, no flight plan, no communication, no performance record, taped or otherwise) of the aircraft remained and was avilable for analysis. To this degree any conclusion of the court or the experts is suspect. Although the failure-in-flight theory is novel, part of the explanation for this is the fact that the magnesium monocoque tailboom structure itself was novel and had been marketed commercialy by Bell for a period of only about eight months prior to the accident of August 15, 1967. We find, under the circumstances, that the case of plaintiffs and Mobil against Bell hinges entirely on the validity of its metallurgists experts, Adams and Stewart; that the testimony of their other witnesses is principally corroborative and must fall if the metallurgists have failed to establish that the fracture at the forward end of Exhibit P-1 commenced in fatigue and propagated within a minute or so to complete failure. In addition to the considerations noted above we have endeavored to determine whether the

theory of these two metallurgists Adams and Stewart, is supported by other evidence in the case. For this purpose we have addressed ourselves principally to the forward edge of P-1 and have kept this exhibit before us at all times during our examination of the testimony.

It is conceded by all parties that magnesium alloy is relatively more sensitive to corrosion that most aluminum alloys when brought into contact with salt water and that the fracture surface on the forward edge of Exhibit P-1 was in fact corroded. Both of plaintiffs' metallurgy witnesses testified that the corrosion was advanced to a point to which it would obliterate the "classic characteristics" of fatigue type failure. The surface was however sufficiently preserved in order to show conclusively, according to all experts, that tensil type fractures clearly existed in the circumference from 8:00 o'clock clockwise to 5:00 o'clock, looking aft at Exhibit P-1 while it is in an upright position.[1]

Having determined that the "classic characteristics" of fatigue fracture had been obliterated, plaintiffs' (and Mobil's) experts turned to less certain indicators. They were able to locate an area of relatively straight fracture which apparently can be indicative of fatigue failure. This is the area omitted from the reference to the tension fracture area mentioned above and extends from 5:00 o'clock clockwise to 8:00 o'clock. In portions of this questioned area there appeared a definite valley in about the center of the fracture face, running parallel to the lines formed by the outside edges of the fracture. Plaintiffs' (and Mobil's) metallurgy experts testified that such a formation was not found in tension fractures of sheetmetal material. Witness Stewart advanced the theory that the valley was caused by two separately occurring fatigue cracks, one on each side of the sheet metal, moving toward the center at an angle and converging to form an indentation.

1 . As to the area from 5:00 o'clock clockwise to 8:00 o'clock, all of Bell's experts were of the opinion that this too was clearly fractured in tension. Bell's experts were of the opinion that the entire 360° fracture was in tension. Plaintiffs' metallurgical experts are not in entire agreement as to the extent of the fatigue fracture. One contended that it extended from 6:00 o'clock clockwise to approximately 8:00 o'clock. The other was of the opinion that the fracture began at a stress riser (rivet hole) near 5:00 o'clock and extended clockwise to a point between 7:00 and 8:00 o'clock. These areas overlap approximately four inches.

The contention that a valley formation of this sort does not occur in tension type fractures was disputed by Bell's experts. Samples were cut from the tailboom of N7846S and placed in a device which applied loads to either end of the strip in opposite directions. These loads were increased until fracture occurred. In several of these samples there was a formation of a very sharply defined V-type valley on one portion of the broken strip and a corresponding pointed ridge on the other portion of the strip. Thus it was clearly demonstrated that such a formation can occur in a tension type break of sheet metal of the type of which this tailboom was constructed.

Plaintiffs' (and Mobil's) witness Stewart cut a sample from the fracture surface of Exhibit P-1 at approximately 6:00 o'clock. This sample was taken within that portion of the fracture which plaintiffs and Mobil contend was a result of fatigue. The sample was examined in detail at various degrees of magnification up to approximately 1400 times its actual size. From this examination the witness testified that he observed no distortion of the grains in the form of elongation and bending at the fracture surface which is normally associated with tension type fractures and also

that he did not find evidence of any "necking down" near the point where the fracture occurred. This so called "necking down" is a normal characteristic of a tensil type fracture of a malleable metal. These findings were the basis of his opinion that there was a fatigue type failure in the fracture surface at the forward edge of Exhibit P-1 originating at approximately 8:00 o'clock (where no stress riser was apparent) and propagating counter-clockwise to approximately 6:00 o'clock, with a very short area of tension type break sandwiched in between. Plaintiffs' (and Mobil's) other metallurgical expert, Adams, was highly qualified but did not make a very extensive study of the fracture. He agreed in general with the findings of witness Stewart. However, the fatigue fracture originated, in his opinion, at a point between 5:30 and 6:00 o'clock in an area where the fractured cell passed through a rivet hole and extended clockwise to a point somewhat short of 8:00 o'clock.

Bell's experts testified that any so called "necking down" which they agree occurred in tensil type breaks of malleable metals, could in fact be very subtle depending on the characteristics of the individual alloy and that no appreciable necking down would appear in a sheetmetal approximately .040 inches thick as is the case here. There was no more evidence of "necking down" in the area which admittedly failed in tension than there was in the area which plaintiffs' and (Mobil's) experts suggest failed in fatigue. Stewart's examination of a sample disclosing no elongation or distortion of grains of the metal itself was meaningless where admittedly there was no standard for comparison examined by witness Stewart, no known fractured surface in magnesium sheetmetal .040 inches thick which failed in fatigue was viewed by him under similar degree of magnification. Thus there was no basis for his opinion that the grains as he

saw them were not sufficiently distorted to indicate tensil type fracture. In contrast to this evidence, Dr. Wiseman made an extended and detailed examination, chemically cleansed corrosion from a sample taken from another portion of Exhibit P-1 fracture surface and took photographs through an electron microscope (magnified 2,600 to 1) of the surfaces and offered textbooks, photographs and examples together with complete explanations indicating exactly how tension type failures would appear under the magnification at which he took his photographs as opposed to how fatigue type failures would appear under the same magnification. Dr. Wiseman also advanced the theory of how the valley type formation could occur in tensil type breaks. This theory was apparently born out by the valley type formations which occurred in some of the tensil type tests conducted on this alloy.

In considering the evidence of these experts we are not unmindful of the fact that Bell's experts, with the exception of Dr. Wiseman, were its own employees, nor are we unmindful of our lack of expertise in this area. We have considered these opinions in conjunction with other evidence in the case principally Exhibit P-1 which has been physically exposed before us throughout our examination of this testimony. The thrust of the testimony of plaintiffs' (and Mobil's) experts is to the effect that a fatigue fracture propagated rapidly about four inches to a point where an intolerable stress load of compression at the top and tension around the remaining surface of the tear resulting in an almost instantaneous completion of the fracture and separation of the tailboom from the rest of the aircraft. The forward edge of P-1 refutes this theory. The compressed area at the top of Exhibit P-1 is approximately seven inches wide

and three inches deep at an angle of about 40°.[2] This area of compression is noted in the testimony of plaintiffs' experts. However, the existence of this area of compression tends to dispute rather than support plaintiffs' (and Mobil's) theory, especially when the adjacent areas of compression on the face of Exhibit P-1 are considered. If, as plaintiffs (and Mobil) contend, the tension fracture propagated from the ends of the alleged fatigue fracture, the principal force was extension, a tearing apart, to complete fracture. An examination of the forward edge of P-1 confirms that the tensil force exerted in that area was not one of extension, but of compression as would be exerted when forward movement of the aircraft was arrested on contact with surface of the water. Thus the area from about 10:30 to 11:30 is in compression in excess of 90° and overlaps the first named compression area to a considerable degree because of a tear behind the compression. The area from about 8:30 to 10:30 is in compression at about 90° and there are tears behind the compression at both the lower and upper extremities of this area. The area from about 1:00 to 3:00 o'clock is in compression about 30° . There is an area of compression between 2:30 and 3:30 (overlapping the immediately above mentioned area) of about 50° with a fracture behind the compression at both the upper and lower ends.

There is an area of compression of about 45° from 4:00 o'clock to 5:00 o'clock in the forward edge of Exhibit P-1 and a tear along the front edge of this area which continues behind and approximately parallel to the main tear to approximately 6:00 o'clock. This evidence is certainly not

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2. The degrees of compression mentioned herein refer to a bending of so many degrees from the original straight (180°) longitudinal plane of the original structure of the monocoque tailboom looking aft.

consistent with the theory that the tailboom was pulled apart by tension up to an area of compression at the top. On the contrary it indicates to us that practically the entire fracture occurred in compression. Severe compression of this type could not occur in an area extending clockwise from 9:00 o'clock to 4:30 unless in the area between 4:30 and 9:00 o'clock was intact or unless the compressions were produced by impact as in the case of the aircraft striking the water. All of the mentioned tears have remained in position as cracks as if made by compression and are not pulled apart in extension as might be the case if fractured in tension. These cracks progress clockwise and counter-clockwise and could not have occurred if the principal fracture had propagated progressively from each end of the alleged fatigue fracture.

In addition to the above we have considered the fact that fatigue failures occur as a result of oscillatory loading and from the evidence presented it appeared that such failure does not occur instantaneously. As to the exact propagation rate of a fatigue crack in this particular metal at this particular location on the tailboom under the particular conditions to which it is subjected on August 15, 1967, there was no evidence on which to base a definite determination. Defendants' experts were unanimous in their opinion that such fractures propagated very slowly, are easily discernible and should be detected by any routine inspection. This conclusion was denied but not really refuted by plaintiffs' experts. Adams, plaintiffs' (and Mobil's) most qualified metallurgist, stated as follows:

> "Now the growth of the crack is a very slow process in which each application of load, as was

> testified to yesterday, each application of load causes the crack to propagate a little bit. It is a stop-and-go type of thing. Between load applications, the limit of the crack is standing still. During load applications, it moves a little bit further." (Tr. pp. 755-756).

Plaintiffs and Mobil introduced thirteen customer service orders sent in to Bell by its Field Representatives from February 1, 1967 thru September 15, 1968 disclosing the occurrence of cracks in various parts of the magnesium monocoque tailbooms of other 206A Jet Ranger Helicopters then in the field. In all of these cases the cracks had propagated at such a slow rate as to allow discovery on routine daily examination and inspection as was maintained by Mobil.

No less than four of Bell witnesses qualified in metallurgy in the operational experience of magnesium monocoque tailbooms were of the definite opinion that if there were no cracks in the tailboom of the N7846S at 1:50 P.M. on the date of the accident and if this aircraft were in operation until approximately 3:30 or 4:00 P.M. that no such crack would possibly nucleate, propagate and go to complete failure during that short period. The inspection at early morning and the inspection by Long and the mechanic just prior to takeoff at 1:50 P.M. have been fixed by Mobil witnesses. The fact that there was no existing crack in the tailboom in the area immediately in the rear of the horizonal stabilizer in the lower left hand quadrant looking aft was established by the fact that Mobil was aware that some of the 206A Bell Jet Rangers were experiencing fatigue cracks in various areas of the tailboom. Because of this notice the mechanics and pilots were "religiously" inspect-

ing the tailboom area for any signs of cracking. The area where this crack would have had to originate according to plaintiffs' metallurgical experts would have been in clear view and discoverable upon inspection. We find that the evidence clearly establishes that the fracture alleged by plaintiffs' (and Mobil's) expert witnesses could not have nucleated, propagated and gone to complete failure during that short period.

Bell has described the fractures referred to in the customer service orders as maintenance nuisance, and handled them as such. The record supports this conclusion. Its customers without exception handled them as a maintenance nuisance. The monocoque tailboom (aluminum) is certainly an accepted commodity on the present market. Petroleum Helicopters, Inc. was operating more than seventy of such aircraft at the time of the trial. Of the thirteen aircraft with magnesium booms referred to in the customers service orders, not one was grounded, not one crashed.

The stability of the magnesium monocoque tailboom is demonstrated by the Bell 206A Jet Ranger belonging to ERA. Photographs of the tailboom of this aircraft are in the record and it was the subject of a customer service order dated August 22, 1968. This craft operated despite a crack which ran more than 180° around the circumference of the tailboom. The remaining unfractured metal of this 206A tailboom was sufficient to withstand the loads applied in the operating of that helicopter.

All the rest of the evidence regarding the liability of Bell is predicated upon the proof of an occurrence of a fatigue fracture in the tailboom of the N7846S. The testimony of plaintiffs' (and Mobil's) owne witnesses establishes that

there was no such fracture existed at 1:50 P.M. on the day of the accident. There is no evidence to indicate the existence of such a fracture thereafter, except the disputed conclusions of the two metallurgists called by plaintiffs and Mobil. Their conclusions are not supported by the other evidence in the case. They are disputed by Bell's witnesses and refuted by the physical evidence above referred to. The evidence does not establish that a fatigue fracture occurred in the tailboom of the N7846S or that the tailboom became separated from the helicopter in flight prior to the accident of August 15, 1967.

The claims against Bell as manufacturer made by the plaintiffs and the third party plaintiff must fall without evidence to support a conclusion that any factor of design or manufacturing technique caused or contributed to the uncontrolled descent of the helicopter. Bell had neither the management of nor control over the operation or maintenance of the unit once it was delivered to Mobil.

The evidence is not sufficient to establish that an inflight separation of the tailboom caused the crash of Mobil's Jet Ranger. In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash cannot be determined with any degree of certainty.

The focus of attention must turn to a determination of liability, if any, on the part of the only remaining defendant, Mobil, the owner and operator of the 206A Jet Ranger.

The plaintiffs seeking recovery from Mobil have, in addition to listed specific acts of negligence, sought to invoke, either by clear implication or by actual pleading, the doc-

trine of res ipsa loquitur. This doctrine unquestionably has application in a cause of action arising in admiralty, either under the Jones Act or under the General Maritime Law. *American Commercial Lines, Inc. v. Silver Creek Coal Co.*, 393 F.2d 178 (7th Cir. 1968), held as follows:

> "Appellant argues that it is entitled to recover under the doctrine of res ipsa loquitur. Unquestionably that doctrine has application in admiralty. Johnson v. United States, 333 U.S. 46, 68 S. Ct. 391, 92 L.Ed. 468 (1948); United Fruit Company v. Marine Terminals Corporation, 9 Cir., 376 F. 2d 1007 (1967); Logan Charter Service, Inc. v. Cargill, Inc., 8 Cir., 373 F.2d 54 (1967). However, "res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient ***.' Sweeney v. Erving, 228 U.S. 233, 240, 33 S.Ct. 416, 418, 57 L.Ed. 815 (1913). And see Johnson v. United States, supra; United Fruit Company v. Marine Terminals Corporation, supra. Even if the doctrine were applicable, the court's findings are not clearly erroneous, particularly in light of the direct evidence of proper unloading by appellee."

See also Johnson v. United States, 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468 (1948); *United Fruit Co. v. Marine Terminal Corporation*, 376 F.2d 1007 (9th Cir. 1967); *Logan Charter Service, Inc. v. Cargill, Inc.*, 373 F.2d 54 (8th Cir. 1967).

There appears little doubt that the jurisprudence developed on this doctrine has been applied to actions involving aircraft accidents. *Cox v. Northwest Airlines, Inc.*, 379 F. 2d 893 (7th Cir. 1967).

In *Cox* the District Court was unable to identify any specific conduct on the part of the defendant which constituted negligence and which was a proximate cause of the disaster, but in reviewing the findings of fact and conclusions of law filed by the District Court, the 7th Circuit affirmed, saying:

> "We are of the opinion that the Court properly applied the doctrine of res ipsa loquitur and that its findings of negligence was a permissible one . ." Cox v. Northwest Airlines, Inc., supra, p. 895).

Although not completely determinative of either liability or causation, the Court feels that some subsidiary findings of fact should be made as a backdrop for the ultimate conclusions.

From the testimony of both the men on the Baxter rig from which the helicopter departed and from the testimony of the pilot who spotted the wreckage, it appears that the weather at the time of the crash and shortly thereafter was overcast with a very light rain falling. Seas in the area were whitecapped at about three to five feet. Mr. Bodin, a workman on board the Baxter rig present when the Jet Ranger made its last takeoff, stated that in his experience helicopters did not routinely move about in the offshore fields in such drizzles. Although there exists a certain amount of doubt as to the extent of the light rain, there is no question in the Court's mind that it was not a "nice, warm, sunny

day" at the location of the crash.

Inasmuch as Mobil performed its own maintenance on the 206A, the extent and quality of their program was deeply explored. The chief pilot and mechanics supervisor for Mobil, Mr. Rhodes, testified that he had personally flown this particular 206A on the morning of the crash, and at that time he had no indication of any problem or potential problem with the aircraft. When Rhodes last saw the aircraft it was being inspected by Mr. Long, the pilot, and a mechanic. In addition, he stated he had personally inspected the craft on that date and found nothing wrong with the Jet Ranger. This inspection included a "religious" inspection of the tailboom in the area of the horizonal stabilizer. The detailed inspection of this area had for its purpose the detection of cracks in the magnesium skin. Rhodes stated that his company had heard of some tailboom cracking on this model helicopter experienced by Petroleum Helicopters, Inc. As a result of this knowledge extra care was being taken to check this area.

Much of the testimony regarding the strict maintenance procedures is disputed by the information shown on the mechanics' worksheets. According to these records, untrained mechanics were servicing the helicopters prior to the accident of August 15. The pilot trip reports are not creditable. If the information on these trip reports was accepted as true, it would show that this helicopter was habitually flown "over the red line" and at speeds substantially over the "VNE" (velocity never to exceed) limit for this model.

From the evidence presented it appeared that Joseph C. Long, the pilot, had a propensity for flying at extremely

altitudes, that is, under 25 feet. This fact was brought out by testimony of men who had flown with Long in the past. Prior to his employment with Mobil, Long had occasion to crash a helicopter owned by his then employer, Petroleum Helicopters, Inc. In that crash it seems that Long was chasing ducks with the helicopter at extremely low altitude when some ducks went through the bubble of the helicopter causing it to crash. Long and his passengers walked away from that incident.

There is no definite proof, and in fact nothing short of pure speculation as to the altitude of the 206A Jet Ranger at the onset of its uncontrolled descent.

These findings and observations on the evidence are not such specific conduct as could enable this Court to proclaim any one or all to be a cause in fact of the crash. For the Court to do so would be an exercise in speculation. The conclusion remains that the cause of the crash is unexplained.

> "The appellant recognizes that the doctrine of res ipsa loquitur may properly have application in actions involving airline accidents. But the appellant contends that in the instant case it was error to apply that doctrine in resolving the issue of liability because there is substantial proof of the exercise of due care by the appellant and no countervailing evidence of specific negligence or even of unusual circumstances. Appellant urges that evidence of due care on its part precludes any inference of negligence arising from the occurrence in the absence of at least minimal supporting evidence and, therefore, libellant has not

> sustained the burden of proof requisite to an ultimate finding of negligence and has failed to prove her case by a preponderance of the evidence.
>
> The evidence of due care to which appellant alludes concerns its maintenance records and procedures with respect to the aircraft involved; the qualified and certified status, and the competence, of the operating personnel of the aircraft and of the dispatcher; the safety training received by the crew; and the evidence that the flight was properly dispatched and the weather normal.
>
> There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A.M. and prior to the crash. In the absence of such evidence, the probative value of appellant's general evidence of due care is not of substantial import. Whether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft can be appraised only in the light of knowledge of what that occurrence was, whether human or mechanical failure or some other incident, and of what if anything was or could have been done about it." Cox v. Northwest Airlines, supra, p. 895).

The doctrine of res ipsa loquitur affords an inference that there was in fact some negligence simply from the occurrence of an unexpected and out of the ordinary event. There has been no specific negligent action or inaction on

the part of Mobil to which the Court can label a contributing factor in this crash.

Mobil had the exclusive control and management of the instrumentality. Such incidents as this crash do not ordinarily occur in the absence of negligence. There is no evidence that any action on the part of Marshall K. Higginbotham, J. L. Shinn or James E. Nation contributed in any manner to the unexplained crash.

The Court finds as a matter of law that the doctrine of res ipsa loquitur in the light of the total effect of the evidence, affords a reasonable inference of fault and is properly applicable to the facts of this litigation.

No claim has been made by the representatives of Joseph C. Long, Jr., the pilot, against his employer, Mobil. There remains, in view of the preceding conclusions, the task of identifying the legal status of the three passengers who lost their lives and determining the law which must govern the recovery, if any, due their survivors.

MARSHALL K. HIGGINBOTHAM

Marshall K. Higginbotham was a toolpusher for Baxter Drilling Company on a submersible drilling barge. He was not employed by Mobil and had only the status of an invitee on Mobil's 206A Jet Ranger at the time of the fatal accident on August 15, 1967. Recovery is sought by his wife and minor daughter under the General Maritime Law, Death on the High Seas Act, 46 U.S.C. 761 et seq., and the Louisiana Wrongful Dealth Act, La. Civ. Code Art. 2315.

The fatal accident occurred on the high seas covering the

Outer Continental Shelf approximately 100 miles off the coast of Louisiana. There is no question of Mobil's liability under the Death on the High Seas Act, *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied* 389 U.S. 1044, 19 L.Ed. 836, 88 S. Ct. 788, and *Dugas v. National Aircraft Corporation*, 438 F.2d 324 (D.C. Pa. 1970).

Mobil is also liable under the General Maritime Law. Mobil's Jet Ranger No. 46 was utilized primarily to serve Mobil's offshore oil and gas operations. It was engaged in such services on the day of the accident, performing the mission of a crewboat in transferring passengers, etc. between the shore and several offshore rigs. The Jet Ranger was engaged in maritime activity at the time of the accident of August 15, 1967, *Executive Jet Aviation v. Cleveland*, *supra*, and a remedy is found in Maritime Law for injuries or death resulting therefrom. *Kermarec v. Compagne Genereale Transatlantique*, 358 U.S. 625, 3 L.Ed.2d 550, 79 S.Ct. 406 (1959), *Moragne v. United States Line, Inc.*, 398 U.S. 375, 26 L.Ed. 2d 39, 90 S.Ct. 1772 (1970). There is dicta in several cases indicating that the wrongful death remedy outlined in *Moragne*, *supra*, might be limited to state territorial waters and that D.O.H.S.A. preempts the field outside that area. *Canal Barge Co., Inc. v. Griffin*, —F.2d— (5th Cir. 1973). However, the language of *Moragne*, *supra*, itself clearly establishes that the action of wrongful death exists in General Maritime Law and there is no indication (even though the accident in that case occurred in the territorial waters of Florida) that the remedy is limited to the territorial waters of the states. The Court stated specifically that the primary source of confusion was not *The Tungus v. Skovgaard*, 358 U.S. 588, 3 L.Ed. 2d 524, 79 S.Ct. 503 (1959), which utilized applicable state wrong-

ful death statutes insuch waters, but *The Harrisburg*, 119 S. 199, 30 L.Ed. 358, 7 S. Ct. 140 (1886), which held that no action for wrongful death existed in the General Maritime Law:

> "The extent of the role to be played by state law under The Tungus has been the subject of substantial debate and uncertainty in this Court, see Hess v. United States, 361 U.S. 314, 4 L.Ed. 2d 305, 80 S.Ct. 341 (1960); Goett v. Union Carbide Corp., 361 U.S.340, 4 L.Ed.2d 341,80 S.Ct. 537 (1960) with opinions on both sides of the question acknowledging the shortcomings in the present law. See 361 U.S.,at 314-315, 338-339, 4 L.Ed. 2d at 305, 308, 321, 80 S.Ct. 341. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in The Tungus, but in The Harrisburg, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed."

See also *Sennett v. Shell Oil Co.*, 325 F.Supp 1 (E.D. La. 1971).

The claim under the provisions of Louisiana Civil Code Article 2315 is denied. *Sennett v. Shell Oil Co., supra, In Re Farrell Lines, Incorporated*, 337 F.2d 91 (E.D. La. 1971). Thus the representatives of Higginbotham are entitled to recover under the General Maritime Law and under the Death on the High Seas Act.

JAMES L. SHINN

The representatives of Shinn seek recovery under the Jones Act, Death on the High Seas Act, the General Maritime Law and the Laws of Texas. Their claim under Texas law is dismissed since this claim was directed against defendant Bell who has been dismissed.

Shinn was an employee of Mobil and a toolpusher on one of its drilling barges. Mobil has stipulated that he was a member of the crew of that vessel but contests his seaman's status on the ground that he was not in the service of a vessel at the time of his death. We find that Mobil's contention is not sustained by the evidence. Mobil's barge on which Shinn served as a toolpusher was located some 100 miles at sea. Mobil does not pretend that Shinn was to transport himself to or from the rig. It is undisputed that Mobil's personnel were transported to and from the rigs by Mobil and that Mobil assumed the duty to provide such transportation to Shinn. Mobil did in fact control, own and provide such transportation, namely, Mobil's illfated 206A Jet Ranger, when Shinn met his death. During this transportation phase of his employment, Shinn was clearly "in the course of his employment" so as to render Mobil liable under the Jones Act. *Hopson v. Texaco, Inc.*, 86 S.Ct. 765, 383 U.S. 262, 15 L.Ed. 2d 740 (1966). See also *Comment*, 46 *Tul. L. Rev.* 877 (1972).

Shinn's death gives rise to a cause of action under the Death on the High Seas Act as well as the Jones Act. The valid claim by Jones Act plaintiffs will not affect the legality of the claim by plaintiffs under D.O.H.S.A. *Doyle v.*

Albatross Tanker Corp., 260 F.Supp 303, *aff'd*, 367 F.2d 465 (N.Y. 1965). *Gvittsman v. Weston King Co.*, 263 F. Supp 633 (Cal. 1967); *Petition of Risdale & Anderson, Inc.*, 291 F.Supp. 353 (Mass. 1968).

The next question is whether the Shinn plaintffs can sue his employer, Mobil, under the General Maritime Law.

The Oceola, 189 U.S. 158, 47 L.Ed. 760, 23 S.Ct. 483, 23 S.Ct. 483 (1903) has been cited universally as authority for the doctrine that a seaman may not sue his employer under the General Maritime Law for injuries resulting from the employer's negligence as distinguished from unseaworthiness. This case established the so-called void which was filled later by the passage of the Jones Act. But the holding is not so broad as generally imagined.

The doctrine of *The Oceola* finds its basis in the fellow servant rule and should be restricted to instances in which a member of the crew of the vessel is injured by the negligence of another crew member of the same ship. The court in *The Oceola* declared:

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> 1. . . . (maintenance and cure) . . . .
>
> 2. . . . (unseaworthiness) . . . .
>
> 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.
>
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Shinn was not the fellow servant of every worker in the Gulf employed by Mobil. Certainly he was not the fellow servant of Nation or Long who were also employees of Mobil. Shinn was Mobil's toolpusher on the Pinrod Drilling Barge 50 and his fellow servants consisted of the crew of that drilling barge. The 206A Jet Ranger was performing services ordinarily performed by a crewboat and Shinn had no identification whatsoever with the Ranger. Under the circumstances, neither Long, Higginbotham nor Nation was a fellow servant of Shinn. Since the prohibition of *The Oceola* does not apply, there is a cause of action under the General Maritime Law.

Shinn's remedies under the Jones Act are not exclusive. His collateral remedy at Maritime Law may be had where appropriate as in the traditional instance of unseaworthiness. *Moragne, supra; Sennett, supra.* We therefore find that in addition to having an action under the Jones Act, the representatives of Shinn also have a cause of action under the General Maritime Law and under the Death on the High Seas Act.

JAMES E. NATION

The representatives of Nation seek to recover under La. Civ. Code Art. 2315, the Death on the High Seas Act, the Jones Act and the General Maritime Law. We find that Nation's exclusive remedy against his employer, Mobil, is the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.* This coverage applies to him under the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(c).

At the time of his death on the 206A Jet Ranger Nation was employed by Mobil as a toolpusher on a stationary platform Baxter Rig No. 3. His claim to seaman's status is based on the assertion that he was temporarily on the stationary platform and that his regular employment was on submersible drilling barges owned by Mobil. However, the evidence fails to identify him with any such barge except the Crestwave Topper No. 1 which was not under the control of Mobil at the time of the accident. It had been released by Mobil more than two weeks prior thereto. We find as a matter of fact that Nation was not assigned to a drilling barge, that he was attached to Mobil's stationary platform, that as a matter of law his seaman's status is determined by the situs of his work at the time of his injury and that he was not therefore a seaman on the date of his death. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L.Ed. 205, 72 S.Ct. 216 (1952). *See also, Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 86 L.Ed. 184, 62 S. Ct. 221 (1941); *Flowers v. Travelers Ins. Co.*, 258 F.2d 220 (5th Cir. 1958).

The waters over the continental shelf are "high seas". 43 U.S.C. 1332. We find that the Nation's status under the

Longshoremen's Act is not altered by the fact that his death occurred while he was being transported aboard Mobil's helicopter on the high seas some distance from the stationary rig. Section 1333(a) of the Outer Continental Shelf Lands Act, in declaring that the laws of the adjacent states shall apply as federal law, refers specifically to "that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon". However, Section 1333(b) uses much broader language in referring to the jurisdiction of the United States District Courts:

> "The United States District Courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the Outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent state nearest the place where the cause of action arose."

The geographic area of the district court's jurisdiction is much broader under Section 1333(b) than the specific subsoil, seabed and artificial structures referred to in Section 1333(a). Congress obviously intended in Section 1333(c), in making the provisions of the Longshoremen's and Harbor Workers Compensation Act applicable to employees' death or disability "occurring as a *result of operations in Subsec-*

tion (b) of this Section", that an employee's status and his coverage under the Act would not be subject to continuous and instant traffic-light (seaman to worker-worker to seaman) alterations as his duties might take him on and off the particular platform to which he was attached. *Bertrand v. Forest Corp.*, 441 F.2d 809 (5th Cir. 1971); *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Regan Equipment Co. v. Donovan*, 296 F.Supp. 535 (E.D. La. 1968). The Act envisions that the offshore platform employees have the assured protection of the compensation act. If Congress intended that status of such workers should not be job-related but simply site-related so that his status changed every time he stepped off the platform, the language of the Outer Continental Shelf Lands Act would have reflected this intent. As stated previously, the Act does not provide that the Longshoremen's Act shall apply to disability or death resulting from any injury on a platform. It provides that the Longshoremen's Act shall apply to disability or death "resulting from any injury occurring as result of operations described in subsection (b) of this section" which is quoted in full above. We find, therefore, that Nation's exclusive remedy is the Longshoremen's Compensation Act.

We hold therefore that all demands against defendant and third party defendant Bell be dismissed, that the claims of the representatives of Nation against Mobil be dismissed without prejudice to their rights under the Longshoremen and Harbor Workers Compensation Act, and that there be judgment in favor of the representatives of Higginbotham and against Mobil under the Death on the High Seas Act and the General Maritime Law and in favor of the representatives of Shinn against Mobil under the Jones Act, the Death on the High Seas Act and the General Maritime Law.

We recognize that the jurisprudence regarding quantum particularly under the General Maritime Law has undergone stages of development and change which require the submission of additional authorities. The rendition of formal judgment will be deferred until such authorities have been submitted and considered.

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 25th day of April, 1973.

s/ Nauman S. Scott
UNITED STATES
DISTRICT JUDGE

APPENDIX B

QUANTUM

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Civil Action No. 13,954

MRS. FRANCIS NELL HIGGINBOTHAM ADMX. ETC.
OF MARSHALL K. HIGGINBOTHAM, DECEASED, ETC.

versus

MOBIL OIL CORPORATION, ET AL.

* * * * *

CIVIL ACTION NO. 13,958

MRS. WANDA MOORE LONG, ADMX. OF EST. OF
DECEASED JOSEPH C. LONG, JR., ETC.

versus

BELL HELICOPTER CO., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,316

JEANETTE LEBLANC NATION, PERSONAL REPRE-
SENTATIVE FOR ELLA MENARD NATION AND ROY
GLEN NATION

versus

TEXTRON INDUSTRIES, INC., ETC. ET AL.

* * * * *

CIVIL ACTION NO. 15,326

MRS. ARLINE J. SHINN, IND., ETC.

versus

MOBIL OIL CORPORATION

* * * * *

(Consolidated Cases)

FOR PLAINTIFFS:	MESSRS.
Mrs. Nell Higginbotham Mrs. Jeanette LeBlanc Nations	Charles M. Thompson, Jr. 112 S. Louisiana Avenue Abbeville, Louisiana 70510
Mrs. Wanda Moore Long	Jack C. Caldwell Aycock, Horne, Caldwell & Coleman 519 Main Street Franklin, Louisiana 70538

Mrs. Arline J. Shinn	Jack C. Benjamin Kierr & Gainsburgh Suite 1718 National Bank of Commerce Building New Orleans, Louisiana 70112

FOR THIRD PARTY PLAINTIFF:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112

FOR DEFENDANTS:

Mobil Oil Corporation	Carl J. Schumacher and Robert Badger Lemle, Kelleher, Kohlmeyer, Mathews & Schumacher 1800 National Bank of Commerce Bldg. New Orleans, Louisiana 70112
	Ronald Neill Post Office Box 900 Dallas, Texas 75221

Bell Helicopter Company Bell Aerospace Corporation	Richard R. Christovich and C. Edgar Clouthier Christovich & Kearney Room 1815, American Bank Building New Orleans, Luisiana 70112
	James F. Fitzsimons Mendez & Mont New York, New York

NAUMAN S. SCOTT, JUDGE

QUANTUM

FINDINGS OF FACT

MARSHALL K. HIGGINBOTHAM

1. As per Letters Testamentary issued by the Fifteenth Judicial District Court for the Parish of Vermilion in the proceedings entitled "Succession of Marshall K. Higginbotham" bearing docket Number 5751, dated April 17, 1968, and the Tutorship of Donna Joyce Higginbotham, plaintiff, Mrs. Francis Nell Higginbotham, is the duly qualified testamentary executrix of the Succession of Marshall K. Higginbotham, the personal representative of his estate, and the duly qualified tutrix of Donna Joyce Higginbotham.

2. At the time of the accident, Marshall K. Higginbotham had been married to Francis Nell Higginbotham since June 24, 1950, and had lived with her until his death.

3. Marshall K. Higginbotham was born February 15, 1925, and at the time of death was 42 years of age and had a reasonable life expectancy of 29.45 years. Mrs. Higginbotham was born September 12, 1930, and according to life tables in evidence, had a reasonable life expectancy in excess of that of her husband. One child had been adopted by Mr. and Mrs. Higginbotham on September 21, 1962, but had lived with Mr. and Mrs. Higginbotham since she was six weeks old. This child, Donna Joyce Higginbotham, was nine years of age at the time of her father's death on August 15, 1967.

4. At the time of the casualty, decedent, his wife and Donna resided together in Vermilion Parish, Louisiana.

5. Mrs. Higginbotham and Donna were dependent upon decedent for their support and subsistence.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, Higginbotham was a senior tool pusher employed by Baxter Drilling Company, for whom he had worked continuously since June 11, 1963. Mr. Higginbotham was employed at a salary of $1100.00 per month, plus numerous other items paid in the form of additional salary. Baxter, a corporation of much smaller size than Mobil or Bell, for example, furnished an automobile to decedent, with all expenses included for operation, use, repairs and insurance on the automobile and for his full use. Dr. Herbert Hamilton, an eminent expert in

the field of economics and statistics, assessed a value of $225.00 a month for this one item. A hospitalization policy for his use and family use was furnished by the company. Because Mr. Higginbotham was employed for a company not as large as the defendants in this case, he was allowed considerable leeway in the form of entertainment for him and his family on his company expense account. Additionally, Mr. Higginbotham received other things of value from the safety award program. The evidence shows that he was awarded as many as 2400 S & H Green stamps monthly, if his rig operated without a lost time accident, plus a $50.00 United States Savings Bond at the end of six months and the equivalent of a $100.00 wrist watch at the end of an accident free year. Also, certain pleasure trips such as deer hunts were furnished by his employer as a token of the company's appreciation of his services. Also, according to the undisputed evidence, Mr. Higginbotham, had he lived, would have continued to enjoy increases in his earnings. Mr. Higginbotham and his family had commenced a business of raising running quarter horses, and at the time of his death, had accmulated ten horses. Mr. Higginbotham was a robust man and in excellent health at the time of his death.

8. For many months prior to his death, decedent had been assigned to work on locations in the Gulf of Mexico and worked thereon seven days at a time, followed by seven days off. While he worked offshore, he was furnished food and lodging by Mobil Oil Corporation without cost to him.

9. Because Mr. Higginbotham was employed by a company much smaller than Mobil, he had no scheduled retirement date. It was made very clear during the trial that Mr. Higginbotham had stable and regular employment with Baxter Drilling Company. Because Baxter did not have a stated policy of salary increases, Dr. Hamilton used the salary of D. W. Case, the man who replaced Mr.

Higginbotham after his death in trying to project a sensible rate of increase in the future. Dr. Hamilton presented three methods of calculation for pecuniary loss. Method one represents no change in salary at all from date of death. This method is not appealing. Method two was presented by using the salary of D. W. Case up to and including the date of trial with no change thereafter. This method of calculation also is not appealing because it is not likely that Mr. Higginbotham, with his most productive years ahead of him, would not have received a salary increase. Nevertheless, based on a salary of $15,000.00 a year which Mr. Case commenced receiving within a matter of a few months after Higginbotham's death, if these figures were used from date of death to June of 1973, Higginbotham's wage loss amounts to $87,500.00, not discounted, and from 1973 to 1990, the date on which Higginbotham would have reached age 65, this wage loss amounts to $202,329.00 plus the $87,500.00 or a total of $289,829.00. This would allow Higginbotham no wage increases from 1969 through 1990. Such an assumption is unreasonable.

The third method used by Dr. Hamilton embraced the salary of D. W. Case to the time of trial with approximately a five per cent (5%) annual increase thereafter. Dr. Hamilton reduced these figures to present values as of August 15, 1967, but since the money is not yet paid no reduction is to be made before judgment. The accrued loss of income from date of death to June 15, 1973, 70 months, approximates $93,940.00. This figure was arrived at by taking an expected average earning increase of $92.00 per month (D.W. Case received this) making a total monthly salary of approximately $1,342.00 with no discount up to June of 1973. This monthly salary of $1,342.00 was then projected to 1990 and discounted at five per cent (5%) making a total of $217,220.00. The $93,940.00 added to

$217,220.00 makes a total of $311,160.00. This amount has been reduced by a deduction of fifteen per cent (15%) for personal use, which reduces the net loss to the family to $264,486.00.

Mr. Higginbotham was furnished a car for his personal use while on the beach, an expense account for his personal use, and room and board while on the job. Also his personal consumption was small. The full use of an automobile until retirement, calculated from death to June of 1973 amounts to $15,750.00, not discounted. From June of 1973, to age 65 the loss is, discounted at five per cent (5%), $36,419.00 which makes a total loss of $52,169.00. Insurance, medical and hospital figures came to $3,049.00. not discounted because as Dr. Hamilton explained these costs are constantly on the rise.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost, since his personal needs were simple, and since his income was supplemented by the expense account and car, decedent required approximately fifteen per cent (15%) of his income for personal needs. This percentage is a fair and reasonable apportionment of Higginbotham's total income attributable to his personal use had he survived.

11. Higginbotham provided the guidance, care and discipline of a good father to the minor child Donna, who was residing in his household. His moral qualities, sense of values, beliefs and experiences in life, when considered with the close relationship which existed between him and his child, leads this Court to conclude that the minor child has sustained, during her minority, and will continue to sustain,

further loss from the lack of her father's care, guidance and discipline. This item of damages is assessed at $2,000.00 a year for the child throughout her minority and school years. The award to Donna Higginbotham for this item is $26,000.00.

12. The evidence was uncontradicted and unchallenged that decedent performed services in and about the house, assisting with the payment of bills, maintenance, transporting the family in his company car and on vacation trips. The Court is aware that services such as these have a value which the Court estimates at approximately $50.00 per month. The accrued loss and future loss amounts to approximately $11,956.00. This figure is comprised of an accrued loss of $50.00 per month for seventy (70) months or until June, 1973, or a total of $3500.00, not discounted. Then from June, 1973, decedent had approximately 25 years of reasonable life expectancy and this figure discounted at five per cent (5%) amounts to $8,456.00, or a total of $11,956.00.

13. The above enumerated elements constitute the damages allowable to the administratrix individually and in her representative capacity in this action. If the applicable law authorized an award of general damages, the Court, in this case, would find that the decedent and his wife were happily married for many years; that close and affectionate ties between him and his child did exist; and that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief, as a result of his demise, in the following amounts:

Mrs. Marshall K. Higginbotham	$50,000.00
Donna Joyce Higginbotham	50,000.00
Total General Damages	$100,000.00

14. The pecuniary loss to Mrs. Marshall K. Higginbotham, surviving widow, and Donna Joyce Higginbotham, surviving dependent child, is as follows:

Loss of wages, to date	$93,940.00	
Future loss of earnings, discounted	$217,220.00	
Total Wage Loss		$311,160.00
Less fifteen per cent (15%) attributable to decedent's personal use	$ 46,674.00	
Net Loss to Family		$264,486.00
Loss of Employer's Contributions to Insurance, Medical & Hospital		$ 3,049.00
Loss of personal use of an automobile furnished as additional salary, to date	$15,750.00	
Loss of future use of automobile for personal use, discounted	$36,419.00	

Total loss of use of automobile for personal use		$ 52,169.00
Extra items in connection with employment including savings bonds and other valuables, to date	$ 1,400.00	
Future loss of extra items in connection with employment including savings bonds and other valuables, discounted	$ 3,237.00	
Total extra items		$ 4,637.00
Loss of services to the family, to date	$ 3,500.00	
Loss of services in the future for life expectancy discounted	$ 8,456.00	
Total loss of services		$ 11,956.00
Loss of nurture to Donna Joyce Higginbotham		$ 26,000.00
TOTAL PECUNIARY LOSS		$ 362,297.00

In addition to the lump sum award for nurture, that portion of the pecuniary loss to the minor should be distributed to her at the rate of $4,000.00 per year during minority or a total of $36,000.00. The remainder of the award for pecuniary loss is recoverable by the widow and totals $300,397.00.

JAMES L. SHINN

1. As per Letters Testamentary, issued by the Sixteenth Judicial District Court for the Parish of St. Mary, in the proceedings entitled "Succession of James L. Shinn," bearing docket No. 8213, dated August 12, 1968, plaintiff, Mrs. Arline J. Shinn, is the duly qualified testamentary executrix of the succession of James L. Shinn, and personal representative of his estate.

2. At the time of his death, James L. Shinn had been married to the said Arline Jones Shinn since March 5, 1931, and they had lived together continuously and without separation until his death.

3. The said James L. Shinn was born September 23, 1908, and at the time of his death was fifty-eight years old and had a reasonable life expectancy of 16.8 years. Mrs. Shinn was born on July 13, 1912, and, according to the life tables in evidence, had a reasonable life expectancy in excess of that of her husband. Six children were born of their marriage; namely: Patsy, on October 27, 1933; Phillip, on November 9, 1937; Eldon, on December 7, 1941; James, on January 25, 1944; Gene, on July 15, 1951; and Linda, on October 20, 1955.

4. At the time of the casualty, decedent, his wife, their fifteen-year-old son, Gene, and eleven-year-old daughter, Linda, resided together in Morgan City, Louisiana, in a mobile home at a camp furnished by decedent's employer, Mobil Oil Corporation.

5. Mrs. Shinn and the minor children, Gene and Linda, were dependent upon decedent for their support and sub-

sistence. None of the major children lived in decedent's household at the time of the casualty, nor did they depend upon him for their support.

6. Although the evidence does not indicate the length of time which elapsed while the ill-fated helicopter was crashing, we find that the resultant crash was for all practical purposes instantaneous, thus precluding any award for conscious pain, suffering and mental anguish.

7. At the time of his death, decedent, Shinn, was a senior drilling foreman, or toolpusher, employed by defendant Mobil, for whom he had worked continuously since 1936. Mr. Shinn was employed at a salary of $1,135 per month, plus a ten per cent (10%) bonus for working offshore, or a total wage of $1,249.00 per month. He received, also, certain fringe benefits from his employer and was a participant in all of the benefit plans provided by Mobil, including the savings plan, retirement annuity plan, group life insurance plan and medical insurance program.

8. For many months prior to his death, he had been assigned to work aboard the submersible drill barge, Penrod Drill Barge No. 50, on location in the Gulf of Mexico. His employment duties required him to work on the barge for seven days at a time, followed by seven days of office work at Mobil's headquarters in Morgan City. Then he returned for another seven days on the drill barge, followed by seven days of "off time." While he worked offshore aboard the drilling barge, his employer furnished him with food and lodging.

9. Mr. Shinn had been employed by Mobil for more than thirty years, and was scheduled to retire on October 1,1973.

His employment up to the time of his demise was stable and regular. According to information furnished by Mobil, Mr. Shinn was scheduled to receive a salary increment at an annual rate of approximately 5-6 per cent through 1970 and approximately 5-1/2 to 6-1/2 per cent through 1972. The accrued loss of income from the date of death to June 15, 1973, seventy (70) months, approximates $106,000.00. Since this amount has accrued, no present-value discount is required. In addition, we find decedent would have earned future wages until his retirmenent October 1, 1973, which, when discounted at a rate of five per cent (5%), which this Court finds reasonable, amounts to approximately $3,865.00.

10. Since decedent worked offshore two weeks out of every month, during which time he was furnished food and lodging without cost to him, and since his personal needs were rather simple (he had no expensive hobbies, did not drink or smoke, did not wear expensive clothes), the Court finds that the decedent required about fifteen per cent (15%) of his income for his personal needs. This percentage is a fair and reasonable apportionment of Shinn's total income attributable to his personal use had he survived.

11. The Court further finds that the contributions of Mobil for hospital and medical insurance to which the Shinn family was entitled, up to the date of Mr. Shinn's retirement amounts to $459.00. This loss has accrued also.

12. The value of Mobil's contributions to the savings plan in which Shinn was a participant, amounting to five per cent (5%) of his annual wages, computed to the date of his retirement, totals approximately $5,493.00 to which the claimants are entitled.

13. Had Mr. Shinn survived and retired as anticipated, he would have received a retirement pension from the date of his retirement until death (his life expectancy at retirement was 10.7 years) at an annual rate of $6,970.00. The gross value of this pension amounts to approximately $90,430.00 and, when discounted at the rate of five per cent (5%), the present value of these benefits is $52,105.00. It is not unreasonable to assume that during his retirement Mr. Shinn would utilize more of his income personally than he was using during his working life. His minor son would have reached majority, and, presumably, would not have depended upon support from his father; and the minor daughter would be approaching majority and presumptive independence. From the evidence given by Doctor Hamilton, the Court finds that the net loss to the family amounts to approximately one-half of the value of the retirement benefits, or approximately $26,053.00.

14. Shinn provided the guidance, care and discipline of a good father to the minors, Gene and Linda, who, were residing in the household. His moral qualities, sense of values, religious beliefs and experience in life, when considered with the close relationship which existed between him and his children, leads the Court to conclude that the minor children have sustained, and during their minority will continue to sustain, further loss from the lack of their father's care, guidance and discipline. This item of damages is assessed at the rate of $2,000.00 per year, per child, throughout the child's minority. The award to Gene for this item of damage is $10,000.00; to Linda, the sum of $20,000.00.

15. Based on the evidence which was uncontradicted and unchallenged, the Court finds that decedent was mechanically skilled and performed services in and about the house,

repairing things, maintaining the family automobile, cutting the grass, assisting with the payment of bills, transporting the family in the family car and escorting the family on vacation trips. The Court is aware that services such as these have a value, which the Court estimates at approximately $50.00 per month. The accrued loss and future loss, appropriately discounted, amounts to $8,000.00.

16. The above enumerated elements constitute the damages allowable to the administratrix, individually and in her representative capacity in this action. If the applicable law authorizes an award of general damages, that is to say, damages for nonpecuniary loss, the Court, in such case, would find that the decedent and his wife were happily married for many years, that close and affectionate ties existed between him and all of his children, that each member of his family has sustained a loss from being deprived of his love, affection, companionship and society, and suffered emotional grief as a result of his demise. Therefore, the Court would allow damages for this loss in the following amounts:

Mrs. Arline J. Shinn	$25,000.00
Gene Shinn	25,000.00
Linda Shinn	25,000.00
Patsy Shinn	20,000.00
Phil Shinn	20,000.00
Eldon Shinn	20,000.00
James Shinn	20,000.00

making a total of $155,000.00 general damages.

17. The pecuniary loss to Mrs. Arline J. Shinn, surviving widow, and Gene and Linda Shinn, surviving dependent

children, is as follows:

Loss of wages, to date	$106,000.00	
Future loss of earnings, discounted	3,865.00	
Total wage loss	$109,865.00	
Less fifteen per cent (15%) attributable to decedent's personal use	- $ 16,470.00	
Net loss to family		$ 93,395.00
Loss of employer's contribution to savings plan		$ 5,493.00
Loss of employer's contribution to hospital and medical insurance plan		$ 459.00
Loss of retirement pension benefits, discounted	$ 52,105.00	
Less fifty per cent (50%) attributable to decedent's personal use	- $ 26,052.00	
Net retirement pension benefits due to family		$ 26,053.00
Loss of nurture: Gene Shinn		$ 10,000.00

Linda Shinn	$20 , 000 . 00
Loss of services, discounted	$ 8,000.00
TOTAL PECUNIARY LOSS	$163,400.00

18. In addition to the lump-sum aware for nurture, that portion of the other pecuniary losses to which the minors are entitled, namely, $15,000.00 to Gene Shinn and $30,000.00 to Linda Shinn,should be distributed to them at the rate of $3,000.00 per year, per child, during minority. The remainder of the award for pecuniary loss, namely, $88,400.00, is recoverable by the widow.

CONCLUSIONS OF LAW

Mrs. Francis Nell Higginbotham, as Testamentary Executrix of the Succession of Marshall K. Higginbotham, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Death on the High Seas Act and under the General Maritime Law. 46 U. S.C.A. § 688; 46 U.S.C.A. §§761, 762; *Lindgren v. U.S.*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 688 (1930); *Morange v. States Marine Line, Inc.*, 398 U.S. 75, 90 S.Ct. 772, 26 L.Ed. 2d 339 (1970). Likewise, Mrs. Arline J. Shinn, as Testamentary Executrix of the Succession of James L. Shinn, and as personal representative of his estate, has standing to sue for the claims arising from his death under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. §§51, 59; 46 U.S.C. §§ 761, 762; *Lindgren v. U.S., supra; Morange v. States Marine Lines, Inc., supra; Futch v. Midland Enterprises, Inc.*, 344 F.Supp. 324 (M.D. La. 1972), *aff'd* Jan. 8, 1973, *unreported* (No. 72-2900, 5th Cir.)

The personal representative of each of the decedents may recover for the actual pecuniary loss occasioned by the death. This is the measure of damages under theJones Act, the Death on the High Seas Act, and the General Maritime Law. 46 U.S.C.A. § 688; 45 U.S.C.A. §51; 46 U.S.C.A. §§761, 762; *Michigan Central Railway Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Neal v. Saga Shipping Co.*, 407 F.2d 481, (5th Cir. 1969); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959), *cert. denied* 361 U.S. 88, 80 S.Ct. 157, 4 L.Ed. 2d 121.

Under all of the applicable laws, the Jones Act, the Death on the High Seas Act, and the General Maritime Law, the dependent survivors of each of the decedents are entitled to recover damages for the loss of contributions and support that they would have received out of the accrued and future gross earnings of the decedents had they lived. *Stock v. Chicago Northshore and Milwaukee Railroad Co.*, 203 F.2d 786; *Canal Barge Co., Inc. v. Mary Kathryn Griffith*, No. 71-2226, 5th Cir. 1973; *Morange v. States Marine Lines, Inc., supra; National Airlines, Inc. v. Stiles, supra.*

In determining the extent of loss from future earnings, the Court should consider the decedents' actual earnings at the time of death, his work habits, and his prospects for advancement. *Petition of Risdal & Anderson, Inc.*, 291 F. Supp. 353 (D.C. Mass. 1968); *Petition of Canal Barge Co.*, 323 F.Supp. 805 (N.D. Miss. 1971). The Court should make no deduction for State and Federal income taxes where the yearly estimated earnings, as here, are not clearly above the reach of the middle income scale. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Blue v. Western Railway*, 469 F.2d 487, 492-96 (5th Cir. 1972); *petition for cert. filed*, 41 U.S. L.W. 3393 (Jan. 10 1973) (No. 72-972);

In Re Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1005, 17 L.Ed. 2d 544 (1967); *McWenny v. New York, N.H. and H. R. R.*, 282 F.2d 34 (2nd Cir. 1960), *cert. denied*, 364 U.S. 870, 81 S. Ct. 115, 5 L.Ed. 2d 93; *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836.

Post award losses must be discounted or reduced to present value. We find that under the economic conditions governing this case, a discount rate of five per cent (5%) is proper. *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916); *Blue v. Western Railway of Alabama, supra.*

Privation of parental nurture and guidance to a minor child is an element of pecuniary loss long recognized by federal decisions. *Michigan Central Railway Co. v. Vreeland, supra; Petition of Risdal, supra.* The value of parental nurture, as heretofore found, varies directly with his quality and quantity. *Moore-McCormick Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir. 1961).

Loss of the decedents' services is another pecuniary loss allowable under the laws applicable herein. *Michigan Central Railway Co. v. Vreeland, supra; Dennis v. Central Gulf S.C. Corp.*, 453 F.2d 137 (5th Cir. 1972). Such services of which the Higginbothams and the Shinns have been deprived in the instant case have a definite value although the value has not been established to the penny. To allow a tort-feasor to avoid paying damages, however, because such damages were to some necessary extent imperfectly established, would be unjust and unbearable. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; ABC Paramount*

Records, Inc. v. Tops Record Distributive Co., 374 F.2d 455 (5th Cir. 1967); *See also, Bigalow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 754, 780, 90 L.Ed. 2d 652, 660 (1946).

Since the decision in *Morange, supra*, there have been district court decisions awarding damages for non-pecuniary losses, such as loss of society and survivors' grief. *In Re Sincere Navigation Corp.*, 329 F.Supp. 652 (E.D. La. 1971); *In Re Farrell Lines*, 339 F.Supp 91 (E.D. La. 1971); however, the circuit courts which have considered the issue have uniformly denied grief damages in a general maritime action. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra; Green v. Vantage S.S. Corp.*, 466 F.2d 159 (4th Cir. 1972); *Simpson v. Knutsen, O.A.S.*, 444 F.2d 523 (9th Cir. 1971); *In re U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970). Consequently notwithstanding our factual finding that the survivors have suffered loss of love and affection, and grief as a result of the demise of Mr. Higginbotham and Mr. Shinn we disallow this item of damage. *Canal Barge Co., Inc. v. Mary Kathryn Griffith, supra.*

Pre-judgment interest is discretionary with the court in death claims under the Jones Act, the Death on the High Seas Act, and the General Maritime Law. *Doucet v. Willis Drilling Co.*, 467 F.2d 336 (5th Cir. 1972); *National Airlines Inc. v. Stiles, supra; In re U.S. Steel Corp., supra.* In order to compensate the parties fairly and justly for their losses, the Court will allow pre-judgment interest on these claims at the rate applicable in this form, from date of death, August 15, 1967.

Although we are aware of *Soileau v. Nicklos Drilling Co.*, 302 F.Supp 119 (W.D. La. 1969), which allowed an award for expected accumulation of community property, we feel

that such an award in this case would be far too speculative.

In determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar. Although there are some cases which hold that it is proper to include in this computation costs of living increases, *Cunningham v. Bay Drilling Co.*, 421 F.2d 1398 (5th Cir. 1970); *Canal Barge Co., Inc. v. M. K. Griffith, supra.* we feel that such an additional award would have to await the final outcome of the Fifth Circuit Court of Appeals en banc rehearing of *Johnson v. Penrod Drilling Co.* (Nos. 71-2243, 71-2245).

Plaintiffs should submit a judgment for execution in accordance with Rule 9(e) of this Court.

THUS DONE AND SIGNED in Chambers, at Alexandria, Louisiana, on this 25th day of June, 1973.

S/ Naumann S. Scott
UNITED STATES DISTRICT
JUDGE

APPENDIX C

OPINION OF CIRCUIT COURT OF APPEALS

Mrs. Francis Nell HIGGINBOTHAM, Admx., etc., of Marshall K. Higginbotham, Deceased, etc., et al., Plaintiffs - Appellees Cross-Appellants,

v.

MOBIL OIL CORPORATION, et al., Defendants-Appellants Cross-Appellees

Mrs. Wanda Moore LONG, Admx. of the Estate of Deceased Joseph C. Long, Jr., etc., PLaintiff-Appellant

v.

BELL HELICOPTER CO., etc., Defendant-Appellee

Jeanette LeBlanc NATION, Personal Representative for Ella Menard Nation and Roy Glen Nation, Plaintiffs-Appellants,

v.

TEXTRON INDUSTRIES, INC., etc., et al., Defendants-Appellees.

Mrs. Arline J. SHINN, Individually, etc., et al., Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION and Bell Helicopter, Defendants-Appellees.

No. 74-1275

United States Court of Appeals, Fifth Circuit

Jan. 13, 1977.

Consolidated actions were brought as a result of the death of a pilot and three passengers in a helicopter crash in the Gulf of Mexico. Defendants were the owner operator of the helicopter and the manufacturer. The manufacturer was exonerated, but the owner operator found liable, by the United States District Court for the Western District of Louisiana, Opelousas Division, Nauman S. Scott, J. 357 F. Supp. 1164. Damages were subsequently awarded, 360 F. Supp. 1140. On appeal by all parties except the manufacturer, the Court of Appeals, Thornberry, Circuit Judge, held that the owner operator had properly been held liable. Contrary to the finding of the district court, one passenger, employer by the owner operator, was a seaman on the date of his death, for which there was liability under the Jones Act. Testimony concerning future wage increases was insufficient to support an award based upon a five per cent future earnings increase factor. Death on the High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society. If representatives of the seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under the Jones Act was not a bar to an award for loss of society.

Affirmed in part; reversed in part and remitted.

Godbold, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Gee, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Products Liability -- 75

Causation must be established under doctrine of strict liability, as well as under ordinary negligence.

2. Evidence -- 570

Expert testimony is not controlling but, rather, its credibility is for trier of fact.

3. Courts -- 406.3(22)

Trial judge's reliance on metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation of helicopter crash was understandable whether he was subjectively concerned with negligence or with strict liability, and thus there was not shown any mistake of law to render inapplicable the general rule that trial court's findings would be accepted unless clearly erroneous.

4. Aviation -- 13

Evidence sustained finding that plaintiffs had not carried their burden of proof, against manufacturer of helicopter, as to whether cause of crash was metal fatigue.

5. Negligence -- 121.2(12)

Applicability of res ipsa to any species of accident depends in first instance upon whether mishap is of type that ordinarily does not occur in absence of negligence; rule is based upon human experience, and its application to particular situation must necessarily vary with human experience.

7. Negligence -- 121.2(12)

Application of res ipsa to one defendant and not to another requires that circumstances surrounding injury render it more probable that injury was due to that defendant's negligence than that of the other defendant.

8. Negligence -- 121.2(7)

Every possible alternative cause of injury need not be totally excluded for res ipsa to apply; all that is necessary is that likelihood of other causes be sufficiently reduced that fact finder may reasonably conclude from preponderance of evidence that fault, if any, is attributable to party against whom doctrine is employed.

9. Courts -- 406.3(22)

Where, although trial judge could not attribute helicopter crash to any specific cause, he concluded that, as to helicopter operator, total effect of evidence afforded reasonable inference of fault, no clear error was shown in his finding of negligence on part of operator or in trial judge's being aided by doctrine of res ipsa loquitur, though he found "insufficient" evidence rather than "no" evidence of negligence on part of manufacturer.

10. Seamen -- 29(2)

Once it is established that claimant is seaman, Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unreleated to service of the ship. Jones Act, 46 U.S.C.A. §688; Longshoremen's and Harbor Workers' Compensation

Act, §§1 et seq., 5, 33 U.S.C.A.§§901 et seq., 905.

11. Seamen -- 29(5.16)

Generally, determination of whether individual is "seaman" within purview of Jones Act or maritime law is purely factual matter for determination by jury or fact finder. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

12. Seamen -- 29(2)

Situs of work is not determinative in Jones Act case; seaman, once he has become such, retains his status so long as he performs substantial part of his work on the vessel. Jones Act, 46 U.S.C.A. §688.

13. Courts -- 406.3(10)

Where trial judge's finding was tainted by misapprehension of controlling legal principles, review of evidence by Court of Appeals was free from constraints of clearly erroneous rule.

14. Seamen -- 2

Where during two years prior to his death decedent spent all but small fraction of his working time on submersible drilling barges and where, as drilling foreman, he plainly contributed to mission of drilling barges upon which he was normally stationed, and he was assigned to fixed platform where he had worked during week preceding his death only

as presumably temporary replacement for vacationing foreman, he was, though assigned to work on fixed platform from which he departed as passenger in helicopter which crashed, a "seaman" employee, and his representatives were entitled to maintain Jones Act action for his death. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 5, 33 U.S.C.A. § §901 et seq., 905; Outer Continental Shelf Lands Act, §4(b, c), 43 U.S.C.A.§ 1333(b,c).

15. Death -- 58(2)

In absence of any evidence to support award for conscious pain and suffering prior to death, recovery for pain and suffering was properly denied in actions under Death on the High Seas Act, Jones Act, and General maritime law. Jones Act, 46 U.S.C.A. § 688; Death on the High Seas Act, §1 et seq., 46 U.S.C.A. §761 et seq.

16. Death -- 58(1)

To recover at all for future wage raises, plaintiff was required to bear difficult burden of proving what portion of increases would have been given other than as automatic hedge against inflation, and, although trial judge specifically stated he did not take into consideration decreasing purchasing power of dollar, award based upon five percent future earnings increase factor could not stand.

17. Death -- 67

It is within trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery.

18. Death -- 88

Death on High Seas Act was not exclusive wrongful death remedy outside of state territorial waters, and, under maritime wrongful death remedy, representatives of decedents, on proper proof, could recover for loss of society.Death on the High Seas Act, § 1 et seq., 46 U.S.C.A. § 761 et seq.

19. Death -- 91

If representatives of seaman could establish their right to recovery under maritime wrongful death remedy, their recovery under Jones Act was not bar to an award of damages for loss of society. Jones Act, 46 U.S.C.A. § 688.

* * * * *

Appeals from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, GODBOLD and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

These four consolidated actions were brought to recover damages for the death of the pilot and three passengers of a Bell Jet Ranger helicopter that crashed in the Gulf of Mexico. Plaintiffs sought recovery from Mobil Oil Company, who owned and operated the helicopter, and Bell Helicopter Company, who manufactured it. Mobil cross-claimed against Bell for the cost of the aircraft and for indemnity as to any amounts it might be required to pay to the individual plaintiffs. The district court held Mobil liable for the death of Higginbotham, one of the passengers,

under the Death On the High Seas Act[1] (DOHSA) and general maritime law. It likewise held Mobil liable for the death of Shinn, another passenger, under DOHSA, the Jones Act,[2] and general maritime law. The court found that Nation, the third passenger was a nonseaman employee of Mobil; thus, his representative's recovery was limited to benefits payable under the Longshoremen's and Harbor Workers' Compensation Act[3] (LHWCA). Finally, the district court exonerated Bell entirely, cutting off any recovery by pilot Long's representatives, who sued only Bell.[4] All parties appeal, except Bell.

I

The chief contentions raised in this court concern the district judge's (1) exculpation of Bell, (2) his application of res ipsa loquitur in finding Mobil liable to Shinn's and Higginbotham's representatives, and (3) his ruling as to pas-

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1. 46 U.S.C. § 761 *et seq.* The district judge concluded that admiralty jurisdiction existed over this suit because the accident took place on the high seas and "in conjunction with its extensive offshore activities." 357 F.Supp. 1164, 1167. We think this conclusion correct under *Executive Jet Aviation v. Cleveland,* 1972, 409 U.S. 249, 93 S.Ct493, 34 L.Ed. 2d 454. Admiralty jurisdiction over aircraft accidents occurring on the high seas is not automatically ousted because the craft initially took off from or is normally based within the continental United States. See *In re Dearborn Marine Serv., Inc.* 5 Cir. 1974, 499 F.2d 263, 272 n.17; *Roberts v. United States,* 9 Cir. 1974, 498 F.2d 520, 523-24; *cf.* American Home Assur. Co. v. United States, M.D. Pa. 1975, 389 F.Supp. 657.

2. 46 U.S.C. § 688. The court found, and defendants do not contest, that Shinn's work on a drilling barge made him a Jones Act seaman.

3. 33 U.S.C§ 901 et seq.

4, The district judge's decision as to Bell naturally also required dismissal of Mobil's cross-claims.

senger Nation. The parties also raise a number of subsidiary issues that require discussion. Nevertheless, the facts of the case are fairly straightforward. Mobil used the Bell-manufactured helicopter as an airborne crewboat, ferrying workmen to and from offshore drilling sites. On August 15, 1967, sometime between 3:30 and 4:00 o'clock in the afternoon, the aircraft took off from Baxter Rig No. 3 with all four decedents aboard. When it failed to arrive at its scheduled destination a search was instituted, and the searchers soon discovered wreckage from the helicopter floating several miles from the craft's point of departure. Only a few pieces of the Jet Ranger were recovered, no one witnessed its crash, and no bodies were ever recovered. There had been no radio communication with the helicopter before its disappearance.

II.

The individual plaintiffs (and Mobil) contend that the district judge erred in holding that no case was made out against Bell. At trial they relied upon three different types of evidence to establish Bell's liability. First, they introduced the testimony of two "aircraft crash reconstruction" experts. These witnesses testified, in substance, that all physical evidence available – including the allegedly inverted position of the helicopter when it hit the water, the pattern of damage to the recovered portions of the craft, and the position of the tailboom almost one-half mile from the remainder of the wreckage -- indicated, or was consistent with the theory, that the tailboom separated from the helicopter in mid-air causing it to plummet out of control into the water. Second, to give some substance to their mid-air separation theory, plaintiffs (and Mobil) introduced the testimony of metallurgists who stated that in their opinion

the portion of the tailboom that was recovered contained a fatigue crack. From this crack, these witnesses theorized, a tension crack propagated over nearly the complete circumference of the boom, resulting in compression at the top of the boom and eventually a complete tearing off of the tail from the rest of the helicopter. Finally, plaintiffs (and Mobil) adduced evidence showing that the helicopter involved in the crash was of a new design and that repeated complaints concerning cracks appearing in the tails of these new aircraft compelled Bell to change the alloy used in the tailboom from magnesium to aluminum.

In brief summary, Bell's witnesses disputed the existence of any fatigue cracks in the tailboom, argued that the Jet Ranger represented the highest state of the art, and asserted that the cracks reported by other users of this model helicopter were viewed by Bell and most owners of the craft as a maintenance nuisance rather than a safety hazard. Bell's experts also offered explanations other than mid-flight separation of the tailboom for the pattern of damage to the recovered portions of the Jet Ranger.

The district judge weighed this testimony and entered the following findings of fact:

> The evidence does not establish that a fatigue fracture occurred in the tailboom . . . [and] is not sufficient to establish that an inflight separation of the tailboom caused the crash . . . . In fact, evidence is so insufficient that no actual, probable or suggestive cause of the crash . . . [can] be determined with any degree of certainty.

357 F.Supp. at 1171-72. In light of these adverse fact-findings and the spectre of the "clearly erroneous" rule,

plaintiffs (and Mobil) not unexpectedly invoke the doctrine that "findings induced by or resulting from a misapprehension of controlling substantive principles lose the insulation of F.R.Civ. P. 52(a) and a judgment based thereon cannot stand." *Continental Motors Corp. v. Continental Aviation Corp.*, 5 Cir. 1967, 375 F.2d 857, 859. Specifically, they argue that the trial judge erroneously believed that Bell could be held liable only for some particular negligent act, while in fact, plaintiffs say, they alleged and proved a good cause of action under the doctrine of implied warranty or strict products liability.

Their reasoning goes something like this. The district judge stated that "the case of plaintiffs and Mobil against Bell hinges entirely on the validity of its metallurgists experts . . . [T]he testimony of their other witnesses is principally corroborative . . . ." 357 F.Supp. at 1168. This statement, together with the judge's emphasis on whether the evidence supported the existence of a fatigue failure, reveals the lower court's belief that plaintiffs needed to prove a specific defect in the helicopter. Under products liability doctrines, however, no specific defect need be shown as long as plaintiff establishes that the product malfunctioned. Accordingly, the testimony of the accident reconstruction experts constituted the main thrust of the case-- since that testimony suggested that the helicopter crashed after a mid-flight separation of the tailboom -- and the testimony of the metallurgists was merely corroborative and precautionary since no matter why the boom fell off, a helicopter whose tailboom did so under ordinary flight conditions must have been defective. Hence, the trial judge's misapprehension of the applicable law led him to emphasize the wrong evidence, and this mistaken emphasis accounts for his erroneous conclusion that the tailboom did not break off in mid-air.

Notwithstanding our respect for the ingenuity of plaintiff's theory, we cannot accept it.[5] Initially, we are not convinced that the district judge misunderstood the nature of plaintiffs' case. The complaint clearly alleged negligence, as well as other theories, and much of plaintiffs' evidence manifestly was intended to establish that Bell's testing and supervisory procedures were negligently conceived and executed. Hence, references to negligence in the lower court's opinion are hardly conclusive.

[1-3] Second, plaintiffs fail to understand that the judge's finding that no mid-flight separation took place goes primarily to causation and only circumstantially to the

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5. It is worth mentioning that our court recently reserved the question whether products liability doctrine should be made a part of the general maritime law. *Williams v. Brasea*, 5 Cir. 1974, 497 F.2d 67, 78. This case, however, like *Williams*, is in our view an inappropriate vehicle for deciding the issue, because we conclude that the facts here are insufficient in any event to establish liability under the theory.

We recognize, of course, that a number of courts, including several district courts within this Circuit, have permitted admiralty suits based upon either the breach of an implied warranty or strict products liability. *See Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631; *Streach v. Assoc. Container Transp. Ltd.*, C.D. Cal. 1975, 388 F.Supp. 935; *Houston-New Orleans, Inc. v. Page Engineering Co.*, E.D.La. 1972, 353 F.Supp. 890, 899; *Sears, Roebuck and Co. v. American President Lines, Ltd.*, N.D. Cal. 1971, 345 F.Supp. 395, 401-02; *Kropp v. Douglas Aircraft Co.*, E.D.N.Y. 1971, 329 F.Supp. 447, 455; *Ohio Barge Line, Inc. v. Dravo Corp.*, W.D. Wash. 1971, 326 F.Supp. 863; *In re Alamao Chemical Transp. Co.*, S.D. Tex. 1970, 320 F.Supp. 631, 634-38; *In re Marine Sulphur Transp. Co.*, S.D.N.Y. 1970, 312 F.Supp. 1081, 1102, *modified*, 2 Cir., 460 F.2d 89, *cert denied*, 1972, 409 U.S. 982, 93 S.Ct. 318, 34 L.Ed. 2d 246; *Solleau v. Nicklos Drilling Co.*, W.D. La. 1969, 302 F.Supp. 119, 126-27.

existence of a manufacturing defect.[6] As the Second Circuit recently noted:

> The burden of proving causation is on the plaintiff. . . and causation must be established under the doctrine of strict liability, as well as under ordinary negligence.

In re Marine Suplhur Queen, 2 Cir. 1972, 460 F.2d 89, 101-02; see also *Leverson v. Boeing Co.*, 9 Cir. 1975, 510 F.2d 937. Thus, whether the district judge believed that these cases were based upon negligence or upon strict liability, his inquiry concerning causation would be essentially the same.

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6. This misunderstanding explains plaintiffs' erroneous reliance on *Lindsay v. McDonnell Douglas Aircraft Co.*, 8 Cir. 1972, 460 F.2d 631. In *Lindsay* the Eighth Circuit, after concluding that federal maritime law would and should adopt the doctrine of strict liability in tort, *id.* at 635-36, remanded the case to the district court for a determination of whether a fire observed on a crashing jet airplane was the cause of the accident. The court stated that plaintiff need not prove a specific defect, for the existence of a fire on board "would strongly indicate a malfunction in the aircraft itself resulting from some defect in either manufacture, material, or design." *Id.* at 637. Nevertheless, the court also warned that because the evidence was circumstantial, the inference of defective manufacture from a known malfunction was merely permissible, not compelled. *Id.* at 640. On remand, the district court found that the airplane was not on fire when it hit the water and concluded that plaintiff had not established the existence of a defect. *Lindsay v. McDonnell Douglas Aircraft Corp.*, E.D. Mo. 1972, 352 F.Supp. 633. Plaintiff again appealed, but this time the Eighth Circuit affirmed, holding that the lower court's findings were not clearly erroneous, *Lindsay v. McDonnell Douglas Aircraft Corp.*, 8 Cir. 1973, 485 F.2d 1288.

Lindsay was a stronger case than this one from the plaintiff's viewpoint. Mrs. Lindsay offered the testimony of a shrimp boat captain that he saw Mr. Lindsay's plane burning just before it crashed. Here plaintiffs had no direct evidence of mid-air separation of the tailboom–analogous to the fire in *Lindsay*–so the trial judge to find Bell liable would have been required to infer not just the defect from the malfunction, but the malfunction itself.

Here plaintiffs' only explanation of the crash, as against Bell, was that the tailboom of the helicopter broke off in mid-flight. They needed to prove that theory before they could argue their strong circumstantial case that only a manufacturing defect could have caused such a failure. *Cf. Lindsay v. McDonnell Douglas Aircraft Co.*, supra, at 639-40; *Krause v. Sud-Aviation*, 2 Cir. 1969, 413 F.2d 428. The trial judge's statements about the relative importance of the two types of expert testimony offered by the plaintiffs almost certainly reflected his conclusion that the accident reconstruction evidence was utterly insufficient to establish that the tailboom came off in mid-air without some credible explanation of *why* such an unusual occurrence might have taken place. That is, he focused on the alleged specific defect not necessarily because he thought plaintiffs needed to prove such a defect by direct evidence in order to establish that Bell breached some duty toward persons in plaintiffs' position, but because without the alleged defect he could give no credence to plaintiffs' causation theory. The credibility of expert testimony is for the trier of fact; as this court only recently noted, "expert witnesses appear to assist in the court's decision-making process, not to control it." *Reyes v. Wyeth Laboratories*, 5 Cir. 1974, 498 F.2d 1264, 1289. Bell's witnesses sharply contradicted plaintiffs' accident reconstruction experts on the possibility of mid-air tailboom separation. Hence, we think that the trial judge's reliance on the metallurgical evidence for substantiation or refutation of plaintiffs' theory of causation is perfectly understandable regardless of which theory of Bell's duty--negligence or strict liability--he was subjectively concerned with. For the reasons stated, then, we reject plaintiffs' attempt to strip the lower court's factfinding concerning causation of its "clearly erroneous" shield.

[4] Plaintiffs do not rely solely on their mistake of law attack on the findings of fact, however. They also allege numerous errors in the district court's factual deductions, any one of which if established, they contend, would render the findings clearly erroneous. The voluminous record in this case plainly prevents us from summarizing and analyzing all of these evidentiary challenges. Nevertheless, we have carefully examined each one in light of the record and the district court's opinion. We note that plaintiffs steadfastly insist that their evidence was "uncontradicted." To the contrary, our examination of the record reveals that Bell's witnesses repeatedly contradicted plaintiffs' witnesses, both on the likelihood of mid-air separation of the tailboom[7] and on the existence of a fatigue crack at the area

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7. As earlier noted, plaintiffs cite several items of "accident reconstruction" evidence to support their mid-air separation theory. These include: (1) the routine nature of the flight; (2) the pattern of damage to the recovered portions of the helicopter; (3) the position of the tailboom approximately one-half mile west of the other portions of the wreckage; (4) the allegedly inverted position of the aircraft when it hit the water; and (5) the absence of main rotor strikes on the tailboom.

Without purporting to summarize all of the contrary evidence, and without identifying particular pages in the appendix, the following rebuttal evidence either appears directly in the testimony or is inferable from it: (1) when the helicopter left the drilling rig low level flying conditions in the area were "very poor" due to intermittent showers and thundershowers in the general area; (2) the pattern of damage to the recovered portions of the craft were consistent with a full power crash into the choppy water with resultant tumbling of the helicopter in unpredictable ways; (3) the tailboom may have been either thrown west of the wreckage by the initial impact or blown west by the current and the wind, both of which were westerly; (4) the allegedly inverted attitude of the helicopter when it hit the water may have been attributable either to accidental pilot action or a malfunction in the controls; and (5) the absence of main rotor strikes on the tailboom refutes rather than supports plaintiffs' theory, because if the boom had torn off as plaintiffs argue it would have unavoidably entered the path of the rotor blades.

between six o'clock and eight o'clock on the circumference of the tail.[8] The district judge, who heard the testimony and viewed the exhibits, concluded that plaintiffs had not carried their burden of proof against Bell as to the cause of this unfortunate accident. We cannot say that his conclusion was clearly erroneous.[9] *See Leverson v. Boeing Co.*,

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8. Regarding the existence of a fatigue crack on the tailboom, plaintiffs relied heavily on the testimony of their metallurgists that certain grain deformation typical of tensile-shear failure did not appear in the area on the boom where they argued that the cracking began in fatigue. All of Bell's witnesses denied seeing any evidence of fatigue, and, as the district judge noted, other physical evidence contradicts the fatigue theory. As for the statement in the opinion that "practically the entire fracture occurred in compression," we do not view it, as plaintiffs do, as damning evidence of the district judge's misunderstanding of the metallurgical evidence. Taken in context it is reasonably clear that Judge Scott meant only to say that the extensive areas of compression on the tailboom clockwise between the nine o'clock and 4:30 positions (to which plaintiffs' witnesses testified, *see* App. at 639-640) were more consistent with Bell's "instantaneous static overload" view than with plaintiffs' "fatigue crack and tear" theory. Moreover, at one point in his testimony one of plaintiffs' own witnesses stated that the section of the boom discussed by Judge Scott "started failing in compression," before correcting himself by stating that as a "technical point" no metal fails in compression.

Judge Scott noted his "lack of expertise" in metallurgy. We likewise note ours. Perhaps our judicial system can and should develop better methods for trying difficult questions of scientific or technological fact. *See, e.g.*, Danaher, Piehler, Twerski, & Weinstein, *Product Liability; An Interaction of Law and Technology*, 12 Duquesne L. Rev. 425 (1974); *The Technological Expert in Products Liability Litigation*, 52 Texas L.Rev. 1303 (1974). Nevertheless, this case requires decision now and under our present system; we decline to overturn the considered findings of the district judge on the fatigue issue based only upon the simultaneous presence of disputed expert metallurgical testimony and ambiguous cracks. *See* Danaher, Piehler, Twerski, & Weinstein, *supra*, 12 Duquesne L.Rev. at 430 n. 11; 52 Texas L.Rev. at 1311.

9. The clearly erroneous standard is of course fully applicable to suits in admiralty. *Coulter v. Ingram Pipeline, Inc.*, 5 Cir. 1975, 511 F.2d 735, 736, n. 1.

supra; Lindsay v. McDonnell Douglas Aircraft Co., 8 Cir. 1973, 485 F.2d 1288; *Krause v. Sud-Aviation, supra; Montgomery v. Goodyear Aircraft Corp.*, 2Cir., 1968, 392 F.2d 777.

III.

Having eliminated Bell from the liability picture, the district court proceeded to inquire whether the individual plaintiffs had proved a case against Mobil. After considering the evidence in some detail the court concluded that the accident could not be attributed to any specific derelictions by that company. Nevertheless, aided by the doctrine of res ipsa loquitur Judge Scott ruled that the "total effect of the evidence" afforded a reasonably sufficient basis for attributing the crash to some negligence on the part of Mobil or its employees. Mobil's challenge to this finding requires us to answer two questions: (1) can the res ipsa loquitur doctrine be applied at all to aircraft crashes, and (2) if it can, is its application nonetheless barred here because plaintiffs introduced, along with their evidence against Mobil, evidence of Bell's responsibility for the crash?

Over thirty years ago this court addressed similar questions. In *Morrison v. LeTourneau Co.*, 5 Cir. 1943, 138 F. 2d 339, plaintiff sued both the owner and the operator of an airplane that crashed in unexplained circumstances, killing plaintiff's intestate. After reviewing the meager evidence concerning the cause of the accident, the court ruled that not even res ipsa loquitur could rescue plaintiff's case:

> The doctrine of res ipsa loquitur cannot apply in cases of this sort, because there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition. Even if

> the doctrine of res ipsa loquitur were applicable, there would be the impossibility of determining the defendant against whom the rule should be applied, since the two defendants are charged with separate and distinct acts of negligence. Would the jury be permitted arbitrarily to find that because a wing broke under the circumstances the Flying School furnished a defective ship, or that the ship was negligently operated by the LeTourneau Company? The doctrine of res ipsa loquitur does not supply the material answer that is requisite. Neither does the evidence. It was wholly impossible for the jury to have determined from the evidence, and the inferences reasonably to have been drawn therefrom, either that the ship was defective or that it was negligently operated by Le Tourneau. If the proven facts give equal support to each of two inconsistent inferences, then neither is established, and "judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitlted to recover".

138 F.2d at 341. The foregoing passage discloses that the court denied the applicability of the res ipsa on two grounds: first, because "there is no showing that accidents of this very nature cannot happen to the most skillful pilots in planes of the finest type and condition," and second, because the evidence did not permit the factfinder to choose, for purposes of fixing liability, between two defendants each of which was charged with "separate and distinct acts of negligence." As noted, Mobil urges that identical considerations require us to reverse the district court's judgment against it. We disagree.

A.

[5,6] The applicability of res ipsa to any species of accident depends in the first instance upon whether the mishap is of a type that ordinarily does not occur in the absence of negligence. As this court noted in an early case refusing to apply res ipsa to the explosion of a jet engine:

> Res ipsa loquitur is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown.

Williams v. United States, 5 Cir. 1955, 218 F.2d 473, 476. In 1943 when we decided *LeTourneau* air travel perhaps still seemed so inherently risky that people generally believed that aviation accidents could and did occur without human or mechanical failure. We think experience now teaches otherwise. Major improvements in design and manufacturing technology, in pilot training, and in ground control, communications, and navigational aids, among other things, have combined to give air travel an estimable safety record. By 1964 one distinguished commentator could write that "all the later cases" support the application of res ipsa to airplane crashes. W. Prosser, Law of Torts §39, at 220-21 (3d ed. 1964); *cf.* Annotation, 6 A.L.R. 2d 528. Our court has only recently implied that this use of res ipsa is well settled. *Kelly v. American Airlines, Inc.*, 5 Cir. 1975, 508 F.2d 1379, 1380 & n. 1. *See also* United States v. Johnson, 5 Cir. 1961, 288 F.2d 40, 45. Logic, experience, and precedent compel us to reject the argument that air-

plane crashes ordinarily occur in the absence of default by someone connected with the design, manufacture, or operation of the craft. *Accord, Cox v. Northwest Airlines, Inc.*, 7 Cir. 1967, 379 F.2d 893, *cert. denied*, 1968, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed. 2d 836. Moreover, we see no meaningful distinction for these purposes between a fixed wing plane and a helicopter. Accordingly, we reject the first branch of Mobil's argument.

B.

[7,8] Mobil also argues, however, that "the application of res ipsa to one defendant and not to another requires that the circumstances surrounding the injury render it more probable that the injury was due to that defendant's negligence, than that of the other defendant." (Mobil Brief at 21-22). We entertain no doubt that this contention correctly states the law. *See, e.g., Dowdell v. U.S. Industries, Inc.*, 6 Cir. 1974, 495 F.2d 641, 644; *Domany v. Otis Elevator Co.*, 6 Cir. 1966, 369 F.2d 604, 613; W. Prosser, Law of Torts § 39, at 218 (4th ed. 1971). Moreover, cases can be found employing this reasoning to deny recovery in aircraft crash cases. *See Morrison v. LeTourneau, supra, Campbell v. First National Bank*, D.N.M. 1973, 370 F.Supp. 1096, 1098-99; *cf. Kelly v. American Airlines, Inc., supra; Kelly v. American Airlines, Inc., supra; Kelley v. Central National Bank of Richmond*, E.D. Va. 1972, 345 F.Supp. 737, 741; *Davies Flying Service v. United States*, W.D. Ky. 1953, 114 F.Supp. 776. It does not follow, however, that res ipsa loquitur dropped from this case as a matter of law when plaintiffs and Mobil offered evidence suggesting that a party other than Mobil may have been responsible for the accident. Every possible alternative cause of the injury need not be totally excluded for res ipsa to apply; all that is

necessary is that the likelihood of other causes be sufficiently reduced so that the factfinder may reasonably conclude from a preponderance of the evidence that the fault, if any, is attributable to the party against whom the doctrine is employed.[10]

For example, in *Colditz v. Eastern Airlines, Inc.*, S.D. N.Y. 1971, 329 F.Supp. 691, plaintiffs sued Eastern and Trans World Airlines for injuries suffered when airplanes operated by the two companies collided in mid-air. One issue before the court was whether plaintiffs could rely on res ipsa loquitur in attempting to make out their case. The airlines apparently argued that res ipsa was not available because the collision might have been caused by the negligence

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10. The Restatement (Second) of Torts §328 (d) states, in pertinent part:

> (1) It may be inferred that harm suffered by the plaintiff is caused by the negligence of the defendant when . . .
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence . . . .. (evidence added)

The comment to subsection (b) expands on this idea:

> It is never enough for the plaintiff to prove that he was injured by the negligence of some person unidentified. It is still necessary to make the negligence point to the defendant. On this too the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is *no doubt* that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case. *Again, however, the plaintiff is not required to exclude all other possible conclusions beyond a reasonable doubt, and it is enough that he makes out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the defendant.* (emphasis added)

See also F. Harper & F. James, The Law of Torts § 19.7 (1956).

of the air traffic controllers in charge of directing the flight paths of the two aircraft. Despite substantial arguments offered to demonstrate the controllers' negligence, *see White v. Trans World Airlines, Inc.*, S.D.N.Y 1970, 320 F.Supp. 655, the district judge rejected the airlines' argument by noting that he had exonerated the controllers in a separate case arising out of the same accident. 329 F.Supp. at 693. In the instant case the district judge took up the issue of Mobil's and Bell's culpability in the same proceedings, but he considered Mobil's potential liability only after concluding that the plaintiffs had not carried their burden against Bell.

Even more in point is a recent decision by the Supreme Court of Texas. Plaintiffs sued Mobil Chemical Company for injuries they received when a pipeline safety valve at a Mobil plant ruptured and allowed acetic acid vapor to escape into the atmosphere. Plaintiffs were working near the site of the rupture and inhaled the vapor, causing the respiratory damage for which they sued. To establish Mobil's negligence, plaintiffs relied upon res ipsa. Mobil responded by adducing testimony indicating that the cause of the rupture was a structural defect in the valve -- for which the valve's manufacturer, if anyone, would be liable. The Texas court wrote:

> While the jury was certainly entitled to believe. . . . [Mobil's] explanation, it was not compelled to . . . Since the same mechanism had worked properly the day before, the jury could have concluded that any structural weaknesses were more probably caused by Mobil's maintenance personnel. . . than by causes prior to Mobil's control of the Unit. The jury also could have believed that Mobil's testing procedures were inadequate or negligently followed if it did not discover such structural

weaknesses before pumping acid at high pressure through the system. In short, the jury could still reasonably infer from the circumstances of the accident that the accident was probably caused by Mobil's negligence.

Mobil Chemical Co. v. Bell, 517 S.W. 2d 245, 254 (Tex. 1974).

[9] In the instant case the district judge noted the evidence of (1) slipshod inspection practices by Mobil mechanics, (2) flights by Mobil pilots in excess of the recommended maximum airspeed for the helicopter, and (3) past "hot-rodding" by the Mobil pilot who died in this crash. Although he could not attribute the accident to any one of these causes, Judge Scott concluded that as to Mobil "the total effect of the evidence, affords a reasonable inference of fault." 357 F.Supp. at 1174. The record gives us no cause to doubt that the district judge took into account the strength of the evidence against Bell in assessing the "total effect of the evidence" against Mobil. Thus, no particular significance attaches, for instance, to the judge's couching his holding as to *Bell* in terms of "insufficient" rather than "no" evidence. In fact, Judge Scott's discussion of Mobil's inspection practices and the nature of the cracks that appeared in the tailbooms of other Jet Rangers suggests that he believed that even if the booms were defective from a maintenance viewpoint, they could have become a flight safety hazard only if the operator's inspection and repair practices were grossly negligent. Hence, his reasoning may have proceeded along lines identical to those the Supreme Court of Texas found permissible for the jury in *Mobil Chemical Co. v. Bell, supra.*

In any event, we may reverse the lower court's finding of

negligence only if we are convinced that it is clearly erroneous. *See Kennedy v. Henderscheid*, 5 Cir. 1973, 490 F. 2d 85. We are not left with the definite and firm conviction that Judge Scott erred in the inferences he drew from the circumstances of this case or in his conclusion that Mobil failed to rebut those inferences. *Compare Stevens v. Barnard*, 10 Cir. 1975, 512 F.2d 876, 879-81, with *Krause v. Sub-Aviation, supra.* Consequently, we affirm the judgment against Mobil.

IV.

The representatives of James Nation, another passenger who died in the crash of the Jet Ranger, urge us to reverse the lower court's holding that they can recover only under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The district court found that at the time of his death Nation was employed by Mobil on a fixed drilling platform; hence, as a matter of law, he was not a seaman. Consequently, the court disallowed any claim under the Jones Act.[11] Nation's representatives, however,

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11. Section 4(c) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(c), makes the Longshoremen's and Harbor Workers' Compensation Act applicable "with respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section . . .." Subsection (b) covers "any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources. . . . of the subsoil and seabed of the outer Continental Shelf." Moreover, we have construed § 1333(c) to apply to injuries occurring as a result of operations described in subsection (b) without regard to the physical situs of the injury. *National v. Morris*, 5 Cir. 1973, 483 F.2d 577, 584, cert. denied, 1973, 414 U.S. 1071; 94 S.Ct. 584, 38 L.Ed. 2d 477; Bertrand v. Forest Co., 5 Cir. 1971, 441 F.2d 809, cert. denied, 1971, 404 U.S. 883, 92 S.Ct. 106, 30 L.Ed. 2d 107; *cf. In re Dearborn Marine Serv., Inc.*, 5 Cir. 1974, 499 F.2d 263, 271-77 (law applicable to suits

introduced evidence that Nation spent much of his time during the two years before his death working on submersible drilling rigs, which this court has held are Jones Act vessels. Moreover, the evidence also suggested that Mobil assigned Nation to the fixed drilling platform simply as a temporary replacement for a vacationing co-worker. Under these circumstances it is argued that Nation achieved the status of a Jones Act seaman because of his predominant employment on submersible drilling barges and despite temporary assignments by Mobil to nonseaman employment.

[10] In *Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769, our court held that to claim the status of seaman an injured workman must convince the factfinder that he was, inter alia:

(Footnote 11 continued)
against third parties for platform-related injury occurring on the high seas). Finally, the LHWCA provisions adopted by OCSLA are the *exclusive* remedy of the claimant against his employer. 33 U.S.C. §905.

Section 4(c) of the Act also provides, however, that "[f]or the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section -- (1) the term 'employee' does not include a master or member of a crew of any vessel . . ." Accordingly, we have held that OCSLA offers no obstruction to recovery by a Jones Act seaman for injuries occurring in connection with subsection (b) operations. *Noble Drilling Corp. v. Smith*, 5 Cir. 1969, 412 F.2d 952, cert. denied, 1969, 396 U.S. 906, 90 S.Ct. 221, 24 L.Ed. 2d 182. *See also Smith v. Falcon Seaboard, Inc.*, 5 Cir. 1972, 463 F.2d 206, cert. denied, 1972, 409 U.S. 1085, 93 S.Ct. 688, 34 L.Ed. 2d 672.

The implication of these statutes and decisions for Nation's representatives is that as against Mobil they may recover damages for their decedent's death, which occurred as a result of drilling operations on the outer Continental Shelf, only if Nation was a "member of a crew of any vessel," *i.e.*, a Jones Act seaman. *See Noble Drilling Corp. v. Smith, supra*, at 954-56.

> assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel.

266 F.2d at 779. Later cases have established the proposition that a workman may claim seaman's status despite being stationed on several different vessels during the course of his employment. *Braniff v. Jackson Avenue -- Gretna Ferry, Inc.*, 5 Cir. 1960, 280 F.2d 523, 528. See also *Magnolia Towing Co. v. Pace*, 5 Cir. 1967, 378 F.2d 12, 13; *Taylor v. Packer Diving and Salvage Co.*, E.D. La. 1971, 342 F.Supp. 365, 371, aff'd, 5 Cir. 1972, 457 F.2d 512. Moreover, once it is established that the claimant is a seaman, the Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unrelated to service of the ship. *See Braen v. Pfeifer Oil Transp. Co.*, 1959, 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed. 2d 191; *Crafton v. Tennessee Valley Sand & Gravel Co.*, 5 Cir. 1969, 408 F.2d 1096; *Taylor v. Packer Diving and Salvage Co., supra; cf. Doucet v. Wheless Drilling Co.*, 5 Cir. 1972, 467 F.2d 336, 338-39 ("The only requirement is that the seaman be 'doing the work of his employer pursuant to his employer's orders.' ")

[11-13] The lower court here found as a fact that Nation was not a seaman on the date of his death. Generally, "the determination of whether an individual is a 'seaman' within the purview of the Jones Act or the maritime law is a purely factual matter for determination by the jury or factfinder." *Ross v. Mobil Oil Co.*, 5 Cir. 1973, 474, F. 2d 989, 990. Nevertheless, it is clear that Judge Scott's finding on this issue was tainted by a misapprehension of

controlling legal principles set out above, for he ruled as to Nation "that as a matter of law his seaman's status is determined by the situs of his work at the time of his injury." 357 F.Supp. at 1177. As we have just indicated, however, situs of work is *not* determinative in a Jones Act case.[12] Accordingly, we have reviewed the evidence on Nation's employment status free of the constraints of the clearly erroneous rule. *See Stark v. Shell Oil Co.*, 5 Cir. 1971, 450 F.2d 994, 997; *Continental Motors Corp. v. Continental Aviation Corp., supra.*

[14] Our examination of the record discloses uncontradicted evidence (1) that during the two years prior to his death James Nation spent all but a small fraction of his working time on Mobil's submersible drilling barges, and (2) that Mobil assigned Nation to the fixed platform where he had worked during the week preceding his death as a presumably temporary replacement for a vacationing foreman. The record gives use no cause to believe that Nation's general pattern of employment would have changed substantially had he lived. Given these circumstances, we think that the undisputed evidence requires a finding that Nation was a seaman despite intermittent temporary assignments to fixed platforms as the course of drilling operations required.[13]

12. Although it is true that a worker does not forever remain a seaman solely by virtue of having once been one, *see Desper v. Starved Rock Ferry Co.*, 1952, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205, it does not follow that a seaman automatically loses his status when he is temporarily assigned by his employer to duties off the vessel. *Cf. Keener v. Transworld Drilling Co.*, 5 Cir. 1972, 468 F.2d 729. He retains his status so long as he "perform[s] a substantial part of his work on the vessel." Offshore Co. v. Robison, supra, at 779.

13. There can be no question here as to the second element of the *Robison* test, contribution to "the function of the vessel or to the accomplishment of its mission," 266 F.2d at 779, because as a drilling foreman Nation plainly contributed to the mission of the drilling barges upon which he was normally stationed.

Thus, since Mobil had assigned Nation to work on the fixed platform from which the fatal helicopter took off,[14] his representatives are entitled to maintain a Jones Act action for his death. We have summarily affirmed a district court that permitted a suit under the Jones Act on facts substantially similar to those involved here. *Taylor v. Packer Diving and Salvage Co., Inc., supra.* Accordingly, we reverse the district court's judgment as to Nation's representatives, direct entry of judgment in their favor under the Jones Act,[15] and remand for a determination of damages.

V.

[15] The representatives of Shinn and Higginbotham argue that the district court erred in certain respects concerning its determination of the amount of damages to which they were entitled.[16] Mobil also objects to a portion of the lower court's damages computations. The individual plaintiffs' first contention may be disposed of quickly. The court did not err in denying any recovery for the conscious pain and suffering of Shinn and Higginbotham before their deaths. There is simply no evidence in the record to support such an award. *See In re Dearborn Marine Serv., Inc., supra*, at 288.

[16, 17] More difficult is the question whether the district court erred in using a 5% annual straight line estimated

14. That is, Nation plainly was within the scope of his employment.

15. We have already approved the district court's finding that Mobil's negligence probably caused the crash.

16. The district judge's opinion on damages is reported at 360 F. Supp. 1140.

salary increase to calculate the probable future earnings of Marshall Higginbotham.[17] Mobil contends that this method of calculation amounts to an increase based upon inflation. Judge Scott specifically stated that "[i]n determining the amount of the awards for loss of future earnings, we did not take into consideration the decreasing purchasing power of the dollar." 360 F. Supp. at 1150. In so holding the judge correctly anticipated our recent *en banc* holding in *Johnson v. Penrod Drilling Co.*, 5 Cir. 1975, 510 F.2d 234. Nevertheless, Mobil argues that the 5% straight line annual increase amounted to a hidden inflation-based award because "it is common experience that annual 'raises' are for the most part cost of living wages." Mrs. Higginbotham rejoins that it is "speculative and inaccurate" to assume that all pay raises are cost of living increases rather than awards in "recognition of performance and experience."

Our cases appear conclusive on this problem. For example, in *Petition of Canal Barge Co.*, N.D. Miss. 1971, 323 F. Supp. 805, the district court held that:

> [Plaintiff's decedent] might have reasonably anticipated certain increases in his future earnings; such increases may fairly be calculated at the rate of 2% per year to the end of his work-life expectancy, which is to be also discounted. . . .

17. No similar problem arose as to James Shinn. Mobil, his employer, provided exact information on the pay raises to which he would have been entitled. Even more importantly, Shinn would have retired within a few months of the lower court's judgment, thus mitigating any difficulties as to post-judgment increases in earnings. 360 F. Supp. at 1146.

Id. at 814. On appeal this court initially approved the 2% factor, but treated it as a recovery for the "anticipated annual increase in the cost of living." *Canal Barge Co. v. Griffith*, 5 Cir. 1973, 480 F.2d 11. 28, *rev'd on this point on petition for rehearing*, 5 Cir. 1975, 513 F.2d 91·1. Likewise, in *Johnson v. Penrod Drilling Co.*, supra, the court treated the following finding as an award based upon inflationary factors:

> The wages of one performing the type of work that plaintiff was performing at the time of the accident in issue is likely to increase at the annual rate of 4.8% per annum. This percentage of annual increases in wages was the rate of increase of such wages from 1946 to 1969; and was the rate of annual increases which had held good from the year 1900.

510 F.2d at 238 In *Law v. Sea Drilling Corp.*, 5 Cir. 1975, 510 F.2d 242, the court similarly characterized this finding:

> Cost of living increases and inflation would cause an increase in loss of income from the death of Wesley Law at a rate of 2% per year . . .. Wesley Law was reasonably to be expected to increase his income based on the continued rise in his income reflected by his position and income tax returns.

510 F.2d at 251 & n.33. Finally, in *Robertson v. Douglas Steamship Co.*, 5 Cir. 1975, 510 F.2d 829, the court relied on *Johnson* to reverse an award based upon "loss of future wage increases or inflation or decrease in the purchasing power of money." *Id.* at 836. Manifestly, these cases make

no sharp distinction between "future wage increases"and outright allowances for the effect of inflation.

The Third Circuit has recently noted the close relationship between expert testimony purporting to project future pay raises and explicit inflationary considerations: "Although offered in terms of continuing increases in wage rates, as opposed to a continuing decline in the value of the dollar, the testimony in question reflects a continuing inflationary spiral." *Hoffman v. Sterling Drug, Inc.*, 3 Cir. 1973, 485 F.2d 132, 143, *cf. Magill v. Westinghouse Electric Corp.*, 3 Cir. 1972, 464 F.2d 294, 299-301. *See also* Brooks v. United States, D.S.C. 1967, 273 F.Supp. 619, 627-28. We believe that *Johnson v. Penrod Drilling Co.* and its progeny likewise stand for the proposition that courts may not simply assume that projected wage increases--whether calculated from the decedent's past earning experience or by some other means--would have been granted solely in "recognition of performance and experience." To the contrary, to recover at all for future raises plaintiff must bear the difficult burden of proving what portion of the increases would have been given other than as an automatic hedge against inflation.

Mrs. Higginbotham's economist arrived at the 5% figure for estimating Marshall Higginbotham's probable future annual wage increases by calculating the average annual percentage increases in Higginbotham's salary from the time he began working for Baxter Drilling Company (his employer at the time of the accident) until his death. App. at 2414-15. Included in this calculation was the assumption that Higginbotham, "a very capable tool pusher," would have maintained his past employment record. Nevertheless, the evidence sheds no real light on the basis of Higginbotham's

past raises -- *i.e.* whether they were cost of living bonuses or rewards for productivity.[18] Accordingly, the lower court's award based upon the 5% future earnings factor cannot stand. In view of the recent developments in this area, however, fairness demands that we remand to allow Mrs. Higginbotham an opportunity to prove her damages from the loss of her husband's future earnings according to the standards set out in this opinion. It remains, of course, within the trial judge's discretion to reject any testimony concerning future wage increases as too speculative to support recovery. *Cf. Bach v. Penn Central Transp. Co.*, 6 Cir. 1974, 502 F.2d 1117, 1122; *Hoffman v. Sterling Drug Co., Inc., supra; Magill v. Westinghouse Electric Corp., supra; Rideaux v. Lykes Bros. Steamship Co.*, S.D. Tex. 1968, 285 F.Supp. 153, 156.

[18, 19] As a final point, the representatives of Shinn and Higginbotham allege that because of changes in the law after the district judge decided this case they are now entitled to recover for an element of damages denied them by Judge Scott -- namely, loss of society or loss of love and affection. The district court denied recovery for these damages in reliance on *Canal Barge Co. v. Griffith, supra.* Subsequently, however, the Supreme Court in effect overruled the relevant part of that case by concluding that under the

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18. The salary increases given Higginbotham's replacement as tool pusher were used by the district court to calculate the decedent's lost wages from the date of his death until the date of judgment. This evidence arguably eliminated the more troublesome problems concerning the speculativeness of that award. *Johnson* and the cases following it teach, however, that pre-judgment increases, paid either to the decedent before his death or later to his replacement, may not be applied mechanically to calculate *future* wage increases, because the employer's wage policy may be tied to the rate of inflation or to the cost of living index. *Cf. Eason v. Weaver*, 5 Cir. 1973, 484 F.2d 459.

nonstatutory maritime wrongful death action announced in *Moragne v. State Marine Lines*, 1970, 398 U.S. 375, 90 S.Ct. 1771, 26 L.Ed.2d 339, a decedent's dependents may recover damages for loss of society when death occurs in a state's navigable waters -- an area not covered by DOHSA. *Sea-Land Services, Inc. v. Gaudet*, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9. *See Canal Barge v. Griffith*, 5 Cir. 1975, 513 F.2d 911, 912 (on rehearing); *Skidmore v. Grueninger*, 5 Cir. 1975, 506 F.2d 716, 727-29.

Judge Scott found that both the Shinn and Higginbotham representatives were entitled to recover under the *Moragne* maritime wrongful death remedy; he refused to award damages for loss of society only because, as just noted, the law of the circuit at that time was that loss of society was not a compensable item in a *Moragne* action. In the course of his discussion Judge Scott concluded that *Moragne* is fully applicable to deaths occurring on the high seas, despite the existence of the remedy provided for by the Death on the High Seas Act. 357 F.Supp. at 1175. Although earlier reserving the question of the applicability of *Moragne* on the high seas, *In re Dearborn Marine Serv., Inc., supra* at 270 n.12, a panel of this circuit has since held "that *Moragne* applies not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA," and have accordingly awarded damages for loss of society for a death occurring beyond a marine league from shore. *Law v. Sea Drilling Co.*, 5 Cir. 1975, 510 F.2d 242, 250, *reh. denied, mofidied in part*, 5 Cir, 523 F.2d 793 (1975).[19] On remand, therefore the repre-

19. *Contra, Barbe v. Drummond*, 1 Cir. 1974, 507 F.2d 794, 800-02. If presented as an original matter, the members of this panel would be constrained to reach the result of the First Circuit in *Barbe*. While both *Barbe* and *Law* are undoubtedly correct in extending the right to recover for pain and suffering to deaths occurring on the high seas, the opinion in *Law* fails to distinguish between damages recoverable as survival items and as wrongful death items. Conscious pain and suffering is traditionally -- and logically -- a survival item. Loss of love and affection, or loss of society, on the other hand, is traditionally a wrongful death item. The members of the panel would read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel.

sentatives of Shinn and Higginbotham should be permitted to recover this item of damages.[20]

Affirmed in part; reversed in part and remanded.

GODBOLD, Circuit Judge, concurring in part and dissenting in part:

I agree with Judge Thornberry except for that portion of Part V of his opinion that relates to Higginbotham's future earnings.

On the res ipsa loquitur point I add the following comments. We do not overrule either *Morrison v. LeTourneau*, 138 F.2d 339 (CA 5, 1943), or *Williams v. U.S.*, 218 F.2d 473 (CA5, 1955). *Morrison* was a 1943 decision concerning the 1940 crash of a two place "cub" plane. Res ipsa was inapplicable for several reasons. It was unknown whether the defendant's agent or the other person in the plane was in control as pilot; there were severe winds at the scene; there was no showing that accidents of the type involved could not happen to the most skillful pilots in planes of the finest

20. If the representatives of James Nation can establish their right to recover under *Moragne*, their recovery under the Jones Act will not bar an award of damages for loss of society. *Landry v. Two R. Drilling Co.*, 5 Cir. 1974, 511 F.2d 138; *McDonald v. Federal Barge Lines, Inc.*, 5 Cir. 1974, 496 F.2d 1376.

type and condition. As to the first two elements, they are not present in the instant case. As to the third, in *Williams* our court was concerned with the 1952 midair explosion of a B-47 jet bomber. We declined to apply res ipsa on the basis that the court had no knowledge, judicial or otherwise, of what would cause a jet plane to explode in midair flight. *Williams* recognized, however, that each case seeking to invoke res ipsa must stand or fall upon its own facts; that a situation in which the doctrine was previously inapplicable because of insufficient experience or lack of technical knowledge may currently fall within the scope of the rule; and that experience concerning the particular situation may be so uniform and well established that it is not necessary that it be "proved" by extraneous evidence.

Many of the cases concern common carriers. Mobil is not a common carrier, but its use of a fleet of helicopters as substitutes for crew boats, regularly moving men and equipment from shore to offshore drilling sites and back again, makes it someting very close to a common carrier insofar as analysis of res ipsa is concerned. The ensuing regularity of operation with few significant incidents represents the kind of change in technology which *Williams* refers to, and it is a change which need not be adduced by specific proof but which judges in their experience may recognize. Judge Holtzoff discussed the change in technology concept in *Smith v. Pennsylvania Central*, 76 F.Supp. 940 (D.D.C. 1948). He pointed out that the argument that airplane accidents may be due to mysterious and unknown causes might have been applied to the railroads in their infancy, but that res ipsa was applied to them as early as 1844.

I dissent from the holding, in part V, that it was error for the trial court to calculate Higginbotham's future earnings by using 5% annual straight line estimated salary increases. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (CA5, 1975), was bad enough. Now it is extended. Here, the trial court's result was not based on an economist's projection of future economic cycles but upon circumstantial evidence consisting of past wage increases (those of Higginbotham and of the successor in his job) from which one may infer that the pattern of a sufficiently long period in the past is more likely than not to be the pattern of the future. A court should be entitled to conclude that a past pattern of earnings increases is of sufficient duration and uniformity that it is a reliable basis for an inference with respect to the future, even though the increases embraced in that pattern may contain cost of living increments It seems to me that this is what the trial judge did in accepting the past track record and in holding that he was not taking into consideration decreased purchasing power of the dollar. I would, therefore, affirm on this issue.

In innumerable other contexts we accept the events of the past as the basis for an inference as to what the future will hold. Indeed we often insist upon it as the necessary predicate for an opinion respecting the future. Thus, if the plaintiff's back has hurt for two years since the accident, the doctor is allowed to opine that it will continue to hurt, and we never pause to doubt that this is permissible. We accept, indeed insist upon, projecting life expectancy upon the past record with respect to millions of people, although plaintiff may be (and almost certainly will be) an exception to the projected figure. The examples are endless. Yet we would not permit consideration of evidence that a particular plaintiff had received a $200 per year increase in pay every year for 20 years, unless he could divide it up into "productivity" pay and "economic change pay". In this single area of projecting future earnings we deny ourselves

the best evidence available on the asserted ground that it is not sufficiently reliable, and, in the name of reliability we mandate the artificial conclusion that one will earn the rest of his life what he is earning on the day he is killed or injured. The only thing certain about this is that it is certain to be wrong.

GEE, Circuit Judge concurring in part and dissenting in part:

I fully concur in Parts I and II of Judge Thornberry's thorough and well-reasoned opinion. I am unable to concur, however, in the application of the doctrine of res ipsa loquitur made in Part III, and hence would not reach the matters discussed thereafter. In this circuit, the doctrine of res ipsa loquitur applies in an airplane crash case only if a preponderance of the evidence shows that the *particular accident in question* would ordinarily not have occurred in the absence of defendant's negligence.[1] But the opinion would approve application of the doctrine here by overruling longstanding Fifth Circuit law on the ground that airplane crashes no longer "ordinarily occur" without negligence. *Supra* at slip opinion p. 753,____F.2d at p.___. If

1. *Compare Morrison v. LeTourneau Co.*, 138 F.2d 339, 341 (5th Cir. 1943) ("The doctrine . . . cannot apply in cases of this sort, because *there is no showing* that accidents of this very nature cannot happen [without negligence]."") (emphasis added), with *Williams v. United States*, 218 F.2d 473, 476 (5th Cir. 1955) (per curiam) ("[E]ach case seeking to invoke this doctrine must stand or fall upon its own facts."), and *United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961) ("[P]laintiffs had produced enough evidence to show that [ordinarily] these accidents would not have occurred if [defendants had been diligent.]").

Part III of the opinion really intends this, and if the pronouncement be taken at face value, a sudden and massive shift in our circuit's airplane-crash liability law would occur. Henceforth, as examples, when an aircraft in apparently good working condition vanishes during an over-water flight, or a fishing boat disappears in calm weather without radio transmission or siginificant wreckage, its operator will be liable.

The opinion of the court below attempts no factfindings about whether at the present time airplane accidents in genearal ordinarily occur without negligence; moreover, the record contains nothing approaching the comprehensive evidence of a general nature sufficient to support such a conclusion. If the trial court had meant to make such findings on the basis of the discrete evidence in this particular case, they would rest on an evidentiary basis no sounder--and be no more appropriate--than a finding that all red-headed men are bank robbers derived from evidence that John Smith, a red-headed man, robbed a bank. And if we are finding such facts on disputed evidence, as we should not be, our finding is precisely as groundless when based, as it is, on the same record. If on the other hand, we are announcing law, we are equally wrong to do so and for at least two reasons.

First, as a matter of common sense, it is plain that not all mistakes in judgment are negligent ones. General experience teaches that Hobson's choices arise in all activities subject to the elements, so that the pilot of a properly-functioning aircraft may take the path that leads to death or injury for himself and his passengers without carelessness. As Judge Tuttle once warned:

> It is not true that [an airplane] crashes only if the pilot is *negligent*. Such crashes may be attributable to many things, such as structural defects, conditions of weather, excusable error in pilot judgment falling far short of pilot *negligence*, and the like.

United States v. Johnson, 288 F.2d 40, 46-47 (5th Cir. 1961) (dissenting opinion) (emphasis in original).

Second, on the procedural side, nothing is more firmly established in this circuit than the principle that decisions by a panel of our court are to be overturned only by the Supreme Court or by the court sitting en banc, not by a later panel. Under *LeTourneau*, as Judge Thornberry's opinion avows (Part III, preamble), res ipsa is not presumptively or generally applicable in our circuit to accidents of this nature. And if the conditions of air travel have so improved in the time since *LeTourneau* as to make it so applicable, it is the en banc court that must say so.

Doubtless the res ipsa doctrine will apply in a proper case where specific findings ruling out non-negligent causes can be and have been made on sufficient evidence. This is no such case. As noted, no evidence supports even a general finding that this particular accident would not ordinarily have occurred without negligence. To be sure, the trial judge ostensibly made such a finding, *Higginbotham v. Mobil Oil Corp.*, 357 F.Supp. 1164, 1174 (W.D. La. 1973), but he also found the evidence so insufficient that no probable cause of the accident could be determined. *Id.* at 1172. And four pages of discussion were necessary for him to dispose, in the face of highly conflicting expert testimony, of the structural failure theory, which was rejected at least in part because "very little (absolutely none

of the main power and control units or instrument panel, no flight plan, no communication, no performance record, taped or otherwise) of the aircraft remained and was available for analysis." *Id.* at 1167-68. In other words, there was not enough left of the craft to form a reliable basis for ruling in *or out* structural failure as a cause of the crash. In short, countless possibilities could explain the tragedy in this case, and to allow an inference of fault here is to tolerate blind speculation.

Even if res ipsa were appropriate, the lower court applied the wrong standard of proof. As the majority opinion points out, an inference that a defendant was negligent is permitted only when the likelihood of *all* other possible causes is sufficiently low that the factfinder reasonably concludes from a preponderance of the evidence that defendant *must* have been negligent. Here the finder of fact applied res ipsa after finding only that the evidence as a whole "afford[ed] a reasonable inference of fault." 357 F.Supp. at 1174. The factfinder may reasonably discern several possible explanations, but only a single most probable one.

Thus, the lower court adopted the wrong standard in applying an inappropriate doctrine. I would reverse on the res ipsa loquitur issue. Since this is not to be, however, I concur in Judge Thornberry's disposition of the damages questions discussed in Part V of the majority opinion.

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

Filed: March 7, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74 - 1275

MRS. FRANCIS NELL HIGGINBOTHAM, Admx., etc., of
MARSHALL K. HIGGINBOTHAM, Deceased, etc., et al.,
Plaintiffs-Appelless, Cross-Appellants
Versus
MOBIL OIL CORPORATION, et al.,
Defendants-Appellants, Cross-Appellees

* * * * *

MRS. WANDA MOORE LONG, Admx. of the Estate of
Deceased JOSEPH C. LONG, JR., etc.,
Plaintiff-Appellant
Versus
BELL HELICOPTER CO., etc.,
Defendant-Appellee

* * * * *

JEANETTE LeBLANC NATION, Personal Representative
for ELLA MENARD NATION and ROY GLEN NATION,
Plaintiffs-Appellants
Versus
TEXTRON INDUSTRIES, INC., etc., et al.,
Defendants-Appellees

MRS. ARLINE J. SHINN, Individually, etc., et al.,
Plaintiffs-Appellants
Versus
MOBIL OIL CORPORATION and BELL HELICOPTER,
Defendants-Appellees

Appeals from the United States District Court for the
Western District of Louisiana

ON PETITIONS FOR REHEARING AND PETITIONS
FOR REHEARING EN BANC
(Opinion January 13, 1977, 5 Cir., 197__, __F.2d__).

Before THORNBERRY, GODBOLD, and GEE, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing filed by Mobil Oil Corporation and Mrs. Francis Nell Higginbotham are DENIED and no member of this panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), their petitions for rehearing en banc are DENIED.

The Petition for Rehearing filed by Mrs. Wanda Moore Long is DENIED.

Judge Godbold would grant the petition for rehearing of Higginbotham for the reasons set forth in his earlier dissenting-in-part opinion.

Judge Gee would grant the petition for rehearing of Mobil for the reasons set forth in his earlier dissenting-in-part opinion.

APPENDIX E

JUDGMENT OF UNITED STATES COURT OF APPEALS - FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1275

D.C. Docket No. CA 13-954, ET AL

Mrs. Francis Nell HIGGINBOTHAM, Admx., etc., of Marshall K. Higginbotham, Deceased, etc., et al. Plaintiffs-Appellees Cross-Appellants,

v.

MOBIL OIL CORPORATION, et al., Defendants-Appellants Cross-Appellees. . . . . .

Mrs. Wanda Moore LONG, Admx. of the Estate of Deceased Joseph C. Long, Jr., etc., Plaintiff-Appellant

v.

BELL HELICOPTER CO., etc., Defendant-Appellee

Jeanette LeBlanc NATION, Personal Representative for Ella Menard Nation and Roy Glen Nation, Plaintiffs-Appellants

v.

TEXTRON INDUSTRIES, INC., etc., et al., Defendants-Appellees

Mrs. Arline J. SHINN, Individually, etc., et al., Plaintiffs-Appellants,

v.

MOBIL OIL CORPORATION and Bell Helicopter, Defendants-Appellees.

Appeals from the United States District Court for the Western District of Louisiana

Before THORNBERRY, GODBOLD and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana,and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part, and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs, Higginbotham, Long, and Nation, and defendant, Mobil Oil Corporation, pay to defendant, Bell Helicopter Company, the costs on appeal to be taxed by the Clerk of this Court;

It is further ordered that plaintiff, Higginbotham, be condemned to pay one-half of the costs on appeal to be taxed

by the Clerk of this Court and that defendant, Mobil Oil Corporation, be condemned to pay one-half of said costs;

It is further ordered that plaintiff, Shinn, be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court; and that Mobil Oil Corporation be condemned to pay one-half of said costs;

It is further ordered that defendant, Mobil Oil Corporation pay to plaintiff, Nation, the costs on appeal to be taxed by the Clerk of this Court.

January 13, 1977

GODBOLD, Circuit Judge,concurring in part
and dissenting in part;

GEE, Circuit Judge, concurring in part
and dissenting in part.

Issued as Mandate: